TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION, PLAINTIFF IN ERROR,

vs.

WALLACE B. PHILLIPS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 2, 1922.

(28,745)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION, PLAINTIFF IN ERROR,

vs.

WALLACE B. PHILLIPS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Record from the district court of the U. S. for the southern district of New York	1	2
Writ of error	1	2
Summons	3	3
Bill of complaint	5	3
Answer	11	6
Notice of trial	22	11
Extract from minutes	23	11
Opinion, Hand, J.	25	12
Judgment	36	17
Bill of exceptions	38	18
Testimony of Edward M. Flesh	39	19
Direction of verdict	58	29
Exhibit 1—Certificate of incorporation	59	29
2—Agreement between Bulgarian government and U. S. Food Administration Grain Corporation	65	32

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1922.

	Original.	Print.
Exhibit 3—Receipt from U. S. Food Administration Grain Corporation to Bulgarian government	68	34
5—Letter, Lt. Commander Phillips to Major L. C. Galbraith, September 15, 1919	69	34
A—Stipulation as to competency of facts No. 1.	71	35
B—Stipulation as to competency of facts No. 2.	73	36
C—Stipulation as to competency of facts No. 3.	75	36
D—Stipulation as to competency of facts No. 4.	86	41
E—Executive Orders Nos. 1-5, inclusive, U. S. Food Administration Grain Corporation.	91	43
F—Proclamations	91	43
Stipulation and order settling bill of exceptions	113	54
Stipulation and order extending time	115	55
Petition for writ of error	116	55
Assignment of errors	118	56
Bond on writ of error	128	60
Citation	136	64
Stipulation as to transcript	138	64
Clerk's certificate	139	65
Opinion, Manton, J	140	65
Order amending order for mandate	150	70
Petition for writ of error	152	71
Order allowing writ of error and fixing bond	157	73
Assignment of errors	159	74
Bond on writ of error	166	78
Clerk's certificate	169	82
Citation and service	170	82

a *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a writ of error which is in the said Circuit Court of Appeals before you or some of you between Wallace B. Phillips, plaintiff-in-error (defendant-in-error herein) and United States Grain Corporation, defendant-in-error (plaintiff-in-error herein) a manifest error appears to have happened to the great damage of the said United States Grain Corporation, plaintiff-in-error herein, as by its asignment of error appears.

We being willing that error, if any hath happened, should be duly corrected, and for speedy justice done to the parties aforesaid in its behalf, do command you that, if such judgment be therein given, then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have same at Washington on the 20th day of March next in said Supreme Court of the United States; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. William Howard Taft, Chief Justice of the Said Supreme Court on the —— day of February 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

The foregoing writ is hereby allowed.
HENRY WADE ROGERS,
U. S. Circuit Judge.
Feb. 20, 1922.

b [Endorsed]: United States Circuit Court of Appeals for the Second Circuit. United States Grain Corporation, Plaintiff-in-error, (Defendant Below) against Wallace B. Phillips, Defendant-in-error, (Plaintiff Below). Writ of Error. Orig. Shattuck, Glenn & Ganter, Attorneys for Plaintiff-in-Error, 42 Broadway, Borough of Manhattan, New York City. Service of a copy of the within writ of

error is hereby admitted. Feb. 20th, 1922. Hatch & Clute, Attorneys for Defendant-in-error. United States Circuit Court of Appeals, Second Circuit. Filed. Feb. 20, 1922. William Parkin, Clerk.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Wallace B. Phillips, plaintiff, and the United States Grain Corporation, defendant, a manifest error hath happened, to the great damage of the said Wallace B. Phillips as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with
2 all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of July, 1921, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Joseph McKenna, Senior Associate Justice of the United States Supreme Court this 15th day of June, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

L. HAND,
U. S. District Judge.

3 United States District Court, Southern District of New York.

L. 21-290.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

Summons.

To the Above-named Defendant:

You are hereby Summoned to answer the Complaint in this action and to serve a copy of your Answer on the plaintiff's attorneys within twenty days after the service of this Summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Learned Hand, Judge of the United States District Court, for the Southern District of New York, at the
4 Borough of Manhattan, in the City of New York, this 16th day of March, 1920.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

HATCH & CLUTE,
Attorneys for Plaintiff.

Office and Post Office Address, 100 Broadway, Borough of Manhattan, City of New York.

5 United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

Complaint.

The plaintiff above named by his attorneys, Hatch & Clute, for its complaint against the defendant alleges:

I. At all times hereinafter mentioned plaintiff was and still is a citizen and resident of the State of New York and of the Southern District of New York, and is an officer of the United States Navy, residing at —— in the City of New York, Borough of Manhattan, in the Southern District of New York.

II. Upon information and belief, defendant is, and was at the times hereinafter mentioned, a business corporation, organized and existing under and by virtue of the provisions of an Act of the General Assembly of the State of Delaware, entitled "An Act Pro-
6 viding a General Corporation Law", approved March 10, 1899, and the acts amendatory thereof and supplemental thereto.

III. Upon information and belief that prior to July 1, 1919, the name of the defendant was "Food Administration Grain Corporation", and by an amendment duly had to its certificate of incorporation, on or about July 1, 1919, defendant's name was changed to United States Grain Corporation.

IV. Plaintiff is, and was at the times hereinafter mentioned, a duly appointed and active officer of the United States Navy.

V. Section 1547 of the Revised Statutes of the United States provides as follows:

"The orders, regulations, and instructions, issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner."

VI. Section 1624 of the Revised Statutes of the United States (Paragraph 13, Article 8 of "Articles for the Government of the Navy") provides as follows:

7 any person in the Navy who—

"Thirteenth, Or takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale or traffic, except gold, silver or jewels, for freight or safe keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels, without authority from the President or Secretary of the Navy."

VII. Article 1510, Navy Regulations 1913, which was an order, regulation or instruction issued by the Secretary of the Navy prior to July 14, 1862, provides as follows:

"When gold, silver or jewels shall be placed on board any ship for freight or safe-keeping, as provided by the Articles for the Government of the Navy, the commanding Officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and the amount shall be divided as follows: One-fourth to the commander in chief, one-half to the commanding officer of the ship, one-fourth to the Navy pension fund. To entitle the commander in chief to receive any part of the amount he must have signified to the commanding officer of the ship, in writing, his readiness to unite with him

8 in the responsibility for the care of the treasure or other valuables. When a commander in chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

VIII. Upon information and belief, that, on or about March 28, 1919, the defendant entered into a written agreement with the Government of Bulgaria, wherein and whereby defendant agrees to sell and deliver to the Government of Bulgaria, approximately 14,000 metric tons of American wheat flour and the Government of Bulgaria agrees to pay to the defendant, therefore, in current American dollars the value of said wheat flour to be thereafter fixed. The Government of Bulgaria further agreed, in said written agreement, to pay freight, demurrage and other costs and to deposit a certain sum of gold, aboard a United States vessel as security for the value of the flour.

IX. At the times hereinafter mentioned, plaintiff was the commanding officer of the United States Ship Laub of the United States Navy.

X. Upon information and belief, in the month of September, 1919, gold to the value of approximately 5,200,000 American dollars, which gold was the deposit made by the Government of Bulgaria pursuant to the aforementioned written agreement, was
9 placed on board the said ship Laub, by the defendant, at Constantinople, Turkey, to be transported therefrom to the City of New York, State of New York, for delivery to the defendant.

XI. Plaintiff, as commanding officer of the said ship Laub, signed bills of lading for the amount of said gold.

XII. On or about September 15, 1919, the said ship Laub, having said gold on board, and with plaintiff as commanding Officer thereof, proceeded from Constantinople, Turkey, and arrived at the City of New York, State of New York, on or about October 6, 1919; and thereupon the plaintiff delivered to the defendant, the said gold and the defendant accepted and receipted for the same.

XIII. At the time of the delivery of said gold plaintiff demanded of the defendant the usual percentage for freight which was one per cent.

XIV. Defendant has failed, neglected and refused to pay to plaintiff the usual percentage for freight or any sum of money thereof, all to the damage of plaintiff in the sum of Fifty-two thousand ($52,000) Dollars.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Fifty-two thousand ($52,000) Dollars,
10 together with the costs and disbursements of this action.

HATCH & CLUTE,
Attorneys for Plaintiff.

No. 100 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Wallace B. Phillips, being duly sworn, deposes and says, that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, and the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and, as to such matters, he believes it to be true.

WALLACE B. PHILLIPS.

Sworn to before me this — day of March, 1920.

———,
Notary Public.

11 *Answer.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

The defendant herein, by Shattuck, Glenn, Huse & Ganter, its attorneys, answering the complaint of the plaintiff, respectfully shows unto this court and alleges:

1. Defendant denies so much of the allegations of the complaint contained in the paragraph thereof designated "II" as allege that at all the times in said complaint mentioned the defendant was and is a business corporation.

2. Defendant admits that on or about the 28th day of March, 1919, defendant entered into a written agreement with the Government of Bulgaria, covering the sale by it of approximately fourteen thousand (14,000) metric tons of American wheat flour, to said Government of Bulgaria, but, for greater certainty as to the terms and
12 provisions of said agreement, reference is hereby made to an executed copy thereof, which will be produced upon the trial of this action.

3. Defendant denies the allegations of the complaint contained in the paragraphs thereof designated "XIII" and "XIV," except that it admits that it has not paid to the plaintiff herein the sum of fifty-two thousand dollars ($52,000) or any part thereof.

For a first, separate and distinct defense herein defendant alleges:

4. That at all the times hereinafter mentioned, a state of war existed wherein the Government of the United States and certain allied or associated powers, of the one part, and the Imperial German Government and certain of its allies, of the other part, were belligerents.

5. That heretofore, and on or about the 10th day of August, 1917, the Congress of the United States passed an act entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," which said act was approved August 10, 1917, and, for the purpose of carrying out its purposes, authorized the President of the United States, among other things, to
make such regulations and issue such orders as might be es-
13 sential; to create and use any agency or agencies; to utilize
any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

6. That subsequent to the passage of the aforesaid Act, said President, exercising the power and authority on him by said Act imposed, and for the purpose of carrying the same into effect, by Executive orders caused the following things to be done, in the order hereinafter stated, viz: (*a*) He caused to be established a governmental organization known and called "United States Food Administration" and designated Herbert Hoover as its chief officer with the title "United States Food Administrator" and invested him with all the powers conferred upon said President by said Act, so far as the same applied to foods, feeds and their derivative products. (*b*) He directed said Food Administrator to cause to be organized under the laws of the State of Delaware, an agency, to wit, a corporation with the name of "Food Administration Grain Corporation," which corporation, this defendant, pursuant to such order was thereafter organized under the following conditions imposed by said President, viz: its capital stock should consist of five hundred thousand (500,000) shares of the par value of $100 each, none of which should be sold to any persons other than the United States, except that shares might be issued to directors
for the purpose of qualifying them as such, but shares so
14 issued were to be held by said directors or incorporators in
trust and for the use and benefit of the United States; the officers of said corporation were to be selected with the approval and consent of said President, and said corporation, for the purpose aforesaid, was to have and exercise the powers conferred upon it by its certificate of incorporation and by-laws. (*c*) Said Food Administration Grain Corporation was appointed agent of the United States to purchase wheat and its capital stock was increased to one hundred and fifty million dollars ($150,000,000), all of which was thereafter acquired by the United States. (*d*) The sphere of said corporation's operations was extended beyond the limits of the United States. (*e*) On March 1, 1919, it was designated as an agency, acting with the American Relief Administration, for the purpose of transporting and distributing foodstuffs and supplies to the populations of Europe requiring relief. (*f*) Its corporate name was changed to its present form, viz: "United States Grain Corporation" and its capital stock increased to five hundred million dollars ($500,000,000), all of which was acquired and is now owned and held by the United States.

7. That at all the times hereinafter mentioned, this defendant was, and still is, an instrumentality or agency of the Government of the United States, performing Governmental functions; all of its issued stock is owned by the United States; its officers were elected and qualified with the approval of the President of the United States, and all funds and assets in its hands are the property of the United States.

8. Upon information and belief, that at all the times hereinafter mentioned, Josephus Daniels was Secretary of the United States Navy, clothed with all the power and duties pertaining to such office; Admiral Knapp was ranking United States Naval Officer in South European waters; Rear-Admiral Bristol was Senior United States Naval Officer in command in Turkish waters; the plaintiff herein was a Lieutenant-Commander in the United States Navy and Commanding Officer of the U. S. S. "Laub"; Howard Heinz was agent for the defendant at Sofia, Bulgaria, and L. C. Galbraith was a Major in the Quartermaster's Corp, United States Army, and agent for this defendant and in charge of its affairs at Constantinople, Turkey.

9. Section 1547 of the Revised Statutes of the United States provides as follows:

"The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner."

10. Section 1624 of the Revised Statutes of the United States (paragraph 13, Article 8 of "Articles for the Government of the Navy") provides as follows:

any person in the Navy who—

"Thirteenth. Or takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale or traffic, except gold, silver or jewels for freight or safe keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels, without authority from the President or Secretary of the Navy."

11. Article 1510, Navy Regulations 1913, which was an order, regulation or instruction issued by the Secretary of the Navy prior to July 14, 1862, provides as follows:

"When gold, silver or jewels shall be placed on board any ship for freight or safe-keeping, as provided by the articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and the amount shall be divided as follows: One-fourth to the commander in chief, one-

half to the commanding officer of the ship, one-fourth to the Navy pension fund. To entitle the commander in chief to receive
17 any part of the amount he must have signified to the commanding officer of the ship, in writing, his readiness to unite with him in the responsibility for the care of the treasure or other valuables. When a commander in chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

12. That on or about the 28th day of March, 1919, at the City of Sofia, Bulgaria, an agreement in writing was entered into between the Bulgarian Government, acting through its Minister of War, and this defendant, acting through its said agent, Heinz, in respect to the purchase by said Bulgarian Government of a quantity of American wheat flour; a copy of said contract, as so executed, will be produced upon the trial of this action.

13. That thereafter, and in performance of one of the obligations imposed upon it by said contract, the Bulgarian Government deposited aboard a United States naval vessel gold coin of the value of approximately five million, two hundred thousand dollars ($5,200,000) United States gold, as security for the payment of the flour contracted to be sold to said Bulgarian Government by the aforesaid agreement.

14. Thereafter, said gold was transported on a United States
18 naval vessel from the Port of Varna, Bulgaria, to the Port of Constantinople, Turkey, and was there stored upon divers United States naval vessels.

15. That on or about the 19th day of August, 1919, upon request of said United States Food Administrator, in behalf of this defendant, said Secretary of the Navy cabled to said Admiral Knapp a rule or order issuing from him as such Secretary, suspending the mandatory provisions of Article 1510 of Navy Regulations aforesaid, including the percentage charge therein referred to, such rule or order to be binding upon the commanding officer of the naval vessel to which might be delivered the aforesaid Bulgarian gold, upon the receipt by said commanding officer of a release, releasing both him and the Government of the United States from all responsibility in respect to such gold, except such responsibility as is usual in respect to the care of public property.

16. Upon information and belief, that the aforesaid rule or order of the Secretary of the Navy was duly transmitted to the plaintiff herein as commanding officer of the U. S. S. "Laub," prior to the receipt by him of the aforesaid Bulgarian gold.

17. That thereafter, and on or about the 15th day of September, 1919, there was laden on said U. S. S. "Laub," in the harbor of Constantinople, Turkey, the aforesaid consignment of Bul-
19 garian gold, having an equivalent value in American gold of about five million two hundred thousand dollars ($5,200,000), for transportation from Constantinople, Turkey, to New

York, N. Y. Said gold was received on board said U. S. S. "Laub," by her said commanding officer, plaintiff herein, with knowledge of the aforesaid rule or order issued as aforesaid. Said plaintiff and the Government of the United States were, by defendant's said agent, Major Galbraith, duly released from all responsibility in respect to said gold to the extent and in the manner required by said Secretary of the Navy, and thereafter said gold was transported from Constantinople, Turkey, to New York, N. Y., for the account of this defendant and under the conditions and circumstances in this defense set forth.

For a second, separate and distinct defense defendant alleges:

18. Defendant repeats and re-alleges all of the allegations contained in paragraphs 4 to 7 hereof, both inclusive, with the same force and effect as if herein set forth in full.

19. That plaintiff's cause of action, if any he have, is not maintainable against this defendant, except upon the consent of the United States first had and obtained, and then only in a court wherein claims against the United States are cognizable. No such con-
20 sent has been prayed for or granted in respect to plaintiff's alleged claim.

Wherefore, defendant demands judgment dismissing the complaint herein with costs.

SHATTUCK, GLENN, HUSE & GANTER,
Attorneys for Defendant.

Office & Post-Office Address, 26 Exchange Place, Borough of Manhattan, New York, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Edwin P. Shattuck, being duly sworn, deposes and says:

I am an officer, to wit: the First Vice-President of United States Grain Corporation, defendant named in the foregoing answer. I have read the foregoing answer and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters I believe it to be true. The reason why this verification is made by me and not by the defendant personally is that the defendant is a corporation. The source of my information and
21 the grounds of my belief as to all matters not therein stated upon my knowledge, are from an examination of correspondence, cables, and documents, and conferences had with officers and employees of the defendant in respect to the subject matter of this action.

EDWIN P. SHATTUCK.

Sworn and subscribed to before me this 3rd day of May, 1920

[SEAL.]

JAMES A. HEALY,
Notary Public, New York County.

New York Clerk's No. 475.
New York Register's No. 1562.

Commission expires March 30th, 1921.

22 *Notice of Trial, Plaintiff.*

District Court of the United States of America for the Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

Please Take Notice that the issues in this action will be brought to trial and an inquest taken therein at a stated Term of this Court appointed to be held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, on the 6th day of July, 1920, at 10:30 o'clock in the forenoon, or as soon after as Counsel can be heard.

Dated, New York, June 1st, 1920.

HATCH & CLUTE,
Attorneys for Plaintiff.

522 Fifth Avenue, Now York City, New York.

To:

Shattuck, Glenn, Huse & Ganter, Esqs., 26 Exchange Place,

23 *Extract from the Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 13th day of November in the year of our Lord one thousand nine hundred and twenty.

Present: Honorable Learned Hand, District Judge.

L. 21–290.

WALLACE B. PHILLIPS

vs.

UNITED STATES GRAIN CORPORATION.

Now comes the plaintiff by Hatch & Clute, his attorneys and Harold N. Whitehouse of counsel, and moves the trial of this cause. Likewise comes the defendant by Shattuck, Glenn and Ganter, its attorneys, and Garrard Glenn of counsel. Counsel on both sides stipulate to try the above case by a jury of one. Jury of one.
24 Jury of one, duly empanelled and sworn. At the close of the testimony on both sides, Plaintiff's attorney moves for a direction of a verdict. Defendant's attorney moves for a direction of a verdict. Thereafter on Thursday, December 16, 1920, by direction of the Court: Verdict for the Defendant—Exceptions to plaintiff. Plaintiff's attorney moves to set aside the verdict, and for a new trial. Denied. Exception. Plaintiff may have ninety days to file a bill of exceptions.

Extract from the minutes.

ALEX. GILCHRIST, JR.,
Clerk.

25 *Opinion.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS

against

UNITED STATES GRAIN CORPORATION.

This is an action at law tried before a jury of one. The facts proved are as follows: The plaintiff was a Lieutenant-Commander of the United States Navy in command of U. S. S. "Laub" in September, 1919. The "Laub", a destroyer, was at the time at Constantinople and Captain Greenslade, U. S. N., was the immediate superior of the plaintiff. Superior in rank to Captain Greenslade was Rear-Admiral Bristol, and the commanding officer in the waters of the Eastern Mediterranean was Rear-Admiral Knapp.

The defendant is a corporation organized under the laws of Delaware by order of the President acting through the war powers conferred upon him by the Lever Act, (August 10, 1917). All its stock is owned by the United States and it was originally formed during the war as a convenience in the discharge of the duties
26 of the Food Administrator. After the Armistice that official continued to use it for the relief of European countries under appropriations from Congress. In August, 1919, the defendant made a contract, not expressly authorized by statute, with the Bul-

garian Government for the sale of flour to be paid for either in New York funds or gold. As New York funds were not available, the payment was made in gold, which became the property of the defendant, and it is for the transportation of this that the action is brought.

Having been delivered on board U. S. S. "Galveston" at Varna, the gold, some five millions in amount, was brought to Constantinople and there transferred to the "Laub" under the following circumstances. In August it became apparent that the gold might have to be transported to the United States, and the defendant wishing to secure the services of a naval vessel and to avoid the supposed effect of the Navy Regulations, Article 1510, asked Admiral Knapp to cable to the Secretary of the Navy for the proper authorization. This the Admiral did and received answer on August sixteenth that the Department suspended the Article in question if the defendant released the commanding officer and the United States from all responsibility. Article 1510 provides that "when gold, silver or jewels shall be placed on board of any ship for freight or safekeeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount
27 and be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows:" The statute referred to in Article 1510 is Article Eight of Section 1624 of the Revised Statutes, which defines court-martial offenses. Subdivision 13 of this article makes it an offense to take on board any vessel "any goods or merchandise except gold, silver or jewels for freight or safe-keeping", or to take any compensation for transporting any merchandise but these.

On September tenth, Captain Greenslade ordered the plaintiff to take the gold on board from the "Galveston", his own command, and, as soon as practicable, to carry it to New York, informing him at the same time of the Secretary's cable. The plaintiff received the gold on September fifteenth, and later that day the representative of the defendant, Major Galbraith, U. S. A., came on board and offered the plaintiff a release "from all responsibility * * * except such responsibility as is usually incumbent for the care of public property." The plaintiff by a written paper declined this release and asserted that he had received the gold from Captain Greenslade to whom he had given a receipt and that he took full responsibility for its transportation.

Also on September fifteenth, 1919, Admiral Bristol sent an order to the plaintiff directing him "as soon as practicable" to proceed to New York, and advising him that he was authorized under Article Eight of the statute and Article 1510 of the regulations to
28 take on board the gold stored in the Galveston. The Admiral assumed joint responsibility with the plaintiff and submitted a copy of the Secretary's cable. Admiral Bristol on August twelfth, had already informed Major Galbraith that he claimed his percentage of the commission and that the gold must be regarded as private property and subject to Article 1510.

Harold N. Whitehouse and Maurice W. Clarke for the plaintiff; Garrard Glenn, William B. Walsh and DeWitt C. Jones, Jr., for the defendant.

LEARNED HAND, *D. J.*:

The effect of the statute seems to me very clearly to be only this: It permits officers of the navy in command of ships to carry gold, silver and jewels (as a private venture). Merchandise generally they may not carry since the vessels are not their own; but as a favor, these may make a bargain to carry on such terms as they choose. In so far the United States will permit its ships to be used for the private purposes of its officers. True, the statute does not give that right affirmatively, but it is clearly enough implied and has always been so recognized. So far as Cartas vs. U. S., 250 U. S. 545, has anything at all to do with the case at bar, it involves this conclusion. Article 1510 of the regulations affects to limit this right by requiring the officers to sign bills of lading for such goods and to be "responsible" for them; it fixes the amount of
29 freight money, and divides it between the officer in command, his superior, and the navy pension fund. Both sides concede that in so far as this limited the absolute right of the commanding officer to charge what he could and to keep what he charged it was valid. In the face of that article his right was limited, but the article did not, and could not, impose upon him any obligation to carry any or all gold, silver or jewels that might be tendered. He remained as before legally open to accept any such as he chose, but if he did, he must regard himself as bound by the article in question. It was still a private venture in which he might engage or not, as the inducements moved him.

It is very apparent that neither the officers of the navy nor the defendant so understand the article, but supposed that it affirmatively gave the plaintiff the right to demand a commission unless it was suspended. In this they were in error, because if the plaintiff was under orders to carry the gold, he could not earn any commission whether the article was suspended or not. The statute and the article together only gave him leave to make a contract, and did not of themselves create any obligation against a third party. The only possible obligation would be a contract implied from the defendant's request, and such a contract required a consideration or it was nudum pactum. But, if the plaintiff was in fact under unconditional orders to carry the gold, his consent or even his promise to do so was not a valid consideration.

30 The case comes down, therefore, to this: Was the plaintiff ordered to carry the gold, and was that order valid. The record shows an absolute and unconditional order of Captain Greenslade on the tenth, and if the case stopped there, there could be no recovery, the article having nothing whatever to do with the case under those circumstances. Admiral Bristol's order of the fifteenth must, however, be taken as superseding that of Captain Greenslade, and though it directed the plaintiff to proceed to New York, it did not ex-

pressly order him to carry the gold. Instead, it "authorized" him to do so. This "authorization" was wholly unnecessary, because the statute gave leave to the plaintiff to carry the gold, a leave which neither the Admiral, nor anyone else, could take from him. Probably, the Admiral so supposed and only used the phrase, because he meant to reserve his right to his own share of the commission, because he had denied the right of the defendant to get the gold carried at all as public property.

But, whatever the Admiral meant by the order, in fact he inclosed with it the cable of the Secretary, the second copy of it which the plaintiff had received. Now that cable did profess to suspend the article, and whether or not the Secretary could lawfully do so, the plaintiff nevertheless knew the purpose of the cable which incorporated by reference Admiral Knapp's request for instructions as to the detail of a destroyer to carry the gold. He knew that the Secretary meant the gold to be carried and that too without com-
31 mission. Therefore, when he got Admiral Bristol's order, he could have been under no misgivings as to what his eventual superior intended him to do. It was impossible for him to read the Secretary's cable in any other way than as meaning that the officer eventually designated to do so, should carry the gold and receive no commission. If, therefore, the Secretary had the power to give such an order he was under a duty to carry the gold, and he suffered no legal detriment by doing so. It makes no difference whatever whatever whether the Secretary could suspend the article or not, because it applied any way only to a case in which the plaintiff might withhold his service.

The case, therefore, in its final analysis comes down to whether the Secretary had the power to direct the plaintiff to carry the defendant's gold without commission; that is, whether he might use the navy of the United States for such a purpose, or, as it may be otherwise stated, whether that was a public purpose. I shall assume, though for argument only, that the Secretary had no power to order a ship of the navy to carry the gold of a private person, and that the plaintiff might lawfully have refused to obey such an order, though at least the last question is open to doubt. Even so, I have no doubt that the Secretary had power to order the plaintiff to carry this gold, because of the nature of the defendant's business. I agree that the defendant is a justiciable person, (though see Ballaine v. Alaska Ry., 259 Fed., R. 183), but that is quite another thing from being
32 a person that the navy may not legally assist in its business. In substance, all its property was that of the United States, including the gold in question, even though a crime against it is not a crime against the United States, Salas v. U. S., 234 Fed. R. 842. It had been organized merely as a convenience to the execution of public purposes, as defined by Congress, and it was as much a governmental agency as the navy itself. Its form cannot disguise its true character, U. S. v. Coughlin, 261 Fed. R. 424. To assert that the navy may not lawfully lend its assistance to such a corporation is in effect to say that the United States may not use its several creatures in mutual co-operation for its general purposes. Nor does it

make a difference that the contract with Bulgaria was not authorized. The flour had been the property of the defendant and even if sold without authority, the gold was also its property. It was at Constantinople, however acquired, and it was in any aspect within the lawful purpose of the defendant to get it to New York. It is of no concern to the plaintiff whether the bargain was unlawful through which it became the property of the defendant. That question is totally distinct from that of jurisdiction over the defendant. I hold, therefore, that the Secretary had the power to direct a destroyer to carry the gold, and, as already stated, that he meant to have the proper official, who turned out to be Admiral Bristol, designate some specific one.

33 However, the plaintiff argues that the Secretary's order was conditional upon a release and that the defendant never gave one as required. The only objections urged are that Major Galbraith had no power to release the plaintiff, that he signed for the "Food Administration" and not for the defendant, and that the release was not complete. That Major Galbraith had full power locally is established by uncontradicted proof, and the Secretary can hardly have meant by his order more than a release by the local officers. He certainly did not expect the release to be executed in the United States or even that it should go to London. The right of Major Galbraith is questioned under the by-laws of the corporation, but they do not control between third persons. As to the form of his execution of the release, it is a defect which is a mere lawyer's afterthought. The plaintiff refused to accept the release and insisted upon "full responsibility," because he had received the gold from Captain Greenslade, and supposed that he acquired thereby an indefeasible right to his commission. Had he raised the defect of form it could at once have been corrected; by placing his refusal upon other grounds he prevented the correction of the error, if it was an error, and he waived it. As to the form of the release; it may be observed that the Secretary's order is not to be construed as requiring a release from the responsibility generally obtaining in the case of public property. The plaintiff suggested no objection of the

34 sort at the time, and it would have been preposterous to suppose that he was to be irresponsible for any neglect however gross. Even so, as in the case of the form of execution he waived the defect by placing his refusal on other grounds.

The first defense pleaded is an adequate bar, though it may have been based upon the theory of law that the article must have been suspended. It alleged the Secretary's cable (Article 15) and its transmission to the plaintiff (Article sixteen). The cable was in fact an order though it required that Admiral Bristol should specify the proper ship, a specification not necessary to be alleged in the pleading. It further alleges that the suspension of Article 1510 was "binding" upon the plaintiff. "Binding" for what? Certainly for no other purpose than to compel him to carry the gold without commission and as a part of his general duties as a naval officer. Whatever the defendant's legal theory, it therefore alleged all the facts

necessary to the defense and, in accordance with general rules, it is not committed to its theory of the law.

Verdict directed for the defendant.

December 13, 1920.

——— ———,
D. J.

35 *Notice.*

United States District Court, Southern District of New York.

No. L. 21-290.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

SIRS:

Please take notice that the attached is a copy of the judgment entered in this action on the 21st day of December, 1920, in the office of the Clerk of this Court.

Dated, New York, December 21st, 1920.

Yours, etc.,

SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

Office & Post-Office Address, 26 Exchange Place, Borough of Manhattan, New York, N. Y.

To: Messrs. Hatch & Clute, Attorneys for Plaintiff, 522 Fifth Avenue, New York, N. Y.

36 *Judgment.*

United States District Court Southern District of New York.

L. 21—290.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

The issues in this action having been brought on for trial before Hon. Learned Hand, District Judge, and a jury of one, at a stated term of this Court held on the 13th day of November, 1920, and thence duly continued by adjournment to the date hereof, at the Woolworth Building, in the Borough of Manhattan, City of New York, Southern District of New York, and the issues having been duly tried and both parties having thereupon at the close of all the

evidence moved for the direction of a verdict, and the Court having thereupon reserved its decision on said motions, and thereafter the Court having, after due deliberation, duly directed a verdict in favor of the defendant, and the jury having thereupon, pursuant to such direction, rendered a verdict upon the issues in favor of the defendant, and against the plaintiff; and defendant's costs having
37 been duly adjusted at fifty-five dollars and fifty-seven cents;

Now, on motion of Shattuck, Glenn & Ganter, attorneys for the defendant, it is

Adjudged that the defendant have judgment upon the issues against the plaintiff upon the merits, and that the defendant, United States Grain Corporation, do recover of the said plaintiff the said sum of fifty-five Dollars and fifty-seven cents ($55.57) being the costs of this action as taxed, and that execution issue therefor.

Dated: Southern District of New York, December 21, 1920.

ALEX. GILCHRIST, JR.,
Clerk.

38 *Bill of Exceptions.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff in Error (Plaintiff Below),

against

UNITED STATES GRAIN CORPORATION, Defendant in Error (Defendant Below).

And afterwards, to-wit, on the 13th day of November, 1920, at a Stated Term of said Court, held in the Borough of Manhattan, City of New York, the issues joined between the parties herein coming on to be tried before the Honorable Learned Hand, and a Jury of one, plaintiff (plaintiff in error) appearing by Harold N. Whitehouse, Esq., of Counsel, and the defendant (defendant in error) by Garrard Glenn, Esq., and William B. Walsh, Esq., of Counsel, the following proceedings were had:

Counsel on both sides stipulate that the case may be tried by a jury of one.

A Jury of one is impanelled and sworn.

39 Mr. Glenn: If your Honor please, may I call a witness out of order so that he may go?

The Court: You are for the defendant?

Mr. Glenn: Yes.

The Court: All right, he may go on now; this is really the defendant's case now?

Mr. Glenn: This is really the defendant's case, yes.

EDWARD M. FLESH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Glenn:

Q. Mr. Flesh, what is your connection with the defendant, the United States Grain Corporation?
A. Vice President and Treasurer.
Q. How long have you had that office?
A. The treasurership since July, 1919; second vice president from September 4, 1917.
Q. This corporation originally was named United States Food Administration Grain Corporation, was it not?
A. No, sir; the name of the corporation was Food Administration Grain Corporation.
Q. And its name was changed afterwards?
A. To the United States Grain Corporation.
Q. Mr. Flesh, where were you located during your service in the capacity mentioned?
40 A. From 1917 until December, 1918, I was in charge of the activities in St. Louis, controlling 13 States South, and I was ordered to London by Mr. Barnes, the President of the Grain Corporation, to take charge of the European operations of the Grain Corporation in Europe.
Q. When were you ordered abroad?
A. December 29th, I think it was, 1918.
Q. How long did you stay there?
A. I arrived in England on the 10th of January and was in Europe from the 10th of January until October 1, 1919.
Q. What were your functions in London?
A. I had charge of all of the Grain Corporation's activities in Europe; the appointing of agents.

Mr. Whitehouse: I object to that and ask to have that stricken out. If your Honor please, this corporation was organized under the Laws of Delaware, and the laws provide for the manner of appointing agents, and there is no proper foundation laid for this testimony now.
The Court: Objection overruled.
Mr. Whitehouse: Exception.

A. (continued). The appointing of agents, and caring for the Grain Corporation's activities in Europe.

By the Court:

Q. You had charge of all their European affairs I think you said?
A. Yes, sir.

41 By Mr. Glenn:

Q. Did those activities include the handling of grain?
A. The handling of all commodities in relief.

By the Court:

Q. Relief of distressed communities, I believe?
A. Yes, the American Relief Administration, commodities that were shipped there.

By Mr. Glenn:

Q. When did you first see Major L. C. Galbraith?
A. As I can recall it, I needed a representative for the Grain Corporation at the Black Sea Ports. Our agency was at Constantinople where we discharged these ships, and the sales to the different governments in that section were controlled from the Constantinople Office. I went to Paris and selected Galbraith, instructing him to proceed to London for instructions and for the necessary expenses, to meet the chief accountant of the Grain Corporation in Trieste, and proceed from that point by destroyer to Constantinople.
Q. When was that, approximately, as near as you can remember?
A. As near as I can remember it was about March of 1919.
Q. Was there any arrangement with regard to paying Major Galbraith anything?
A. We paid him a subsistence allowance or a commutation
42 of quarters covering his expenses because he was drawn from the army, and under the President's authority delegated to Mr. Hoover, as Director-General of Relief, Mr. Hoover delegating that authority to me as Grain Corporation Representative, we drew all of our personnel from the army and navy, all of the men that we had in our service; practically all, and they were paid by the army.
Q. You mean they drew their army pay?
A. They drew their army pay; we paid them no salary.
Q. But what you did was to cover their expenses?
A. Covered their expenses.
Q. In view of the fact that they were getting no commutation of quarters under the army regulations?
A. Yes, sir.
Q. Then did you afterwards have an accounting with Major Galbraith?
A. Yes. Our instructions to Galbraith were—we gave him some 400 pounds sterling when he left London, and instructed him on his return to America to make an accounting to the Grain Corporation.
Q. Did he do so?
A. Which he did about, I think it was some time last November or October, I am not quite sure.
Q. After his arrival?
A. After his arrival in America.
Q. On the destroyer?
A. On the destroyer, with gold.

Q. You settled your account with him, he showing his expenses and the account being settled accordingly?

A. We did.

43 Q. Did you instruct Major Galbraith to accompany the gold?

A. Yes, sir.

The Court: I have not heard anything about gold except once.

Mr. Glenn: This case is for percentage; the old Naval Commission, as it is called, on gold transported to the United States on a war vessel.

By the Court:

Q. I understand then Major Galbraith came back on a destroyer, did he?

A. Yes, sir.

By Mr. Glenn:

Q. The Destroyer "Laub"?

A. Yes.

Cross-examination.

By Mr. Whitehouse:

Q. Who was Howard Heinz?

A. Howard Heinz was enlisted by Mr. Hoover, formerly had charge of the United States Food Administration work in Philadelphia, and enlisted to go over for the American Relief Administration.

By the Court:

Q. You mean he enlisted in the army?

A. No, sir; enlisted with the American Relief Administration Service.

44 By Mr. Whitehouse:

Q. Was he the agent of the United States Grain Corporation at Constantinople?

A. No; he was not. Mr. Heinz was appointed by Mr. Hoover to take charge of the American Relief Administration operations in Constantinople.

Q. Do you know that the contract between Bulgaria and the United States Grain Corporation was entered into by Mr. Heinz as agent of the United States Grain Corporation?

A. Yes.

Q. And was he agent at that time?

A. After he went down to Bulgaria, or to Constantinople, took charge of the Food Administration operations; that is, the American Relief Administration operations we had no agent there at that time, and the authority was given him to sign for the Grain Corporation as also the American Relief Administration.

Q. He at that time was the agent of the United States Grain Corporation, at the time he entered into this contract?
A. He was a representative representing us there.
Q. You know what an agent is, do you not, Mr. Flesh?
A. Yes, I think I do.
Q. Do you repudiate his agency?
A. No.
Q. He signed the contract as agent, and was he an agent?
A. He was a representative, if you call that an agent.
Q. You called Galbraith an agent, did you not?
A. He was appointed an agent.
Q. And Mr. Heinz was not appointed an agent?
A. Not by me.
45 Q. Was he by anybody?
A. He was sent down by Mr. Hoover.
Q. With powers to enter into that contract?
A. Yes.
Q. And he was not authorized by the Grain Corporation to do it?
A. No.
Q. You are sure of that?
A. I never authorized him.
Q. You don't know whether he was or not?
A. No.

By the Court:

Q. What relation had Mr. Hoover to the defendant; was he the president?
A. Mr. Hoover was chairman of the Board of the Food Administration Grain Corporation.
The Court: He had full powers, as I take it?
Mr. Whitehouse: No if your Honor please. We contend Mr. Hoover had no relation to the Grain Corporation in this transaction.
The Court: All right. This case is going to develop quite differently from what I supposed. I thought you were going to agree on all your facts.

By Mr. Whitehouse:

Q. Mr. Heinz was not an army or navy man, was he?
A. No, sir.
46 Q. Mr. Hoover at the time of the transaction set forth in the complaint here was the United States Food Administrator, was he not?
A. He was Director General of Relief.
Q. Was he United States Food Administrator?
A. Yes.
Q. Head of the United States Food Administration?
A. He was the United States Food Administrator when he left for Europe, appointed Acting Food Administrator.
Q. I am not asking you anything about when he went there; was he the United States Food Administrator at that time?

A. Up to the time he left here, yes.

Q. Did he cease to be after that?

A. Yes; I think he did, having appointed this acting representative here, because he was appointed Director General of Relief in Europe.

Q. Were you familiar at all with the executive order appointing Mr. Hoover?

The Court: Why do you question him about this; this is clearly incompetent, all this examination.

Mr. Whitehouse: I withdraw the question.

Q. Who were the officers of the United States Grain Corporation in 1919?

A. Julius Barnes was the President; Frank Crowell was the First Vice President and there were some fourteen second vice presidents.

47 Q. Among which you were one?

A. Yes. That was up to July, 1919. After July, 1919, that changed.

Q. When did you say that you spoke to Mr. Galbraith in London?

A. If my memory serves me correctly it was about March. I think he left London about the middle of March.

Q. And what were your instructions to him?

A. My instructions to him were to proceed to Constantinople with the chief accountant whom he would meet at Trieste, and take charge of the Grain Corporation's activities at that point reporting directly to me at London.

Q. Is that all you told him?

A. Well, I may have told him a good many other things. I went over in detail the matters with him.

Q. As far as you remember you told him to take charge of the United States Grain Corporation's activities at Constantinople?

A. He was sent there to represent the Grain Corporation as our agent in Constantinople, yes.

Q. And to take charge of what? Were there any specific instructions to him?

A. As I remember it, we had commodities come in there, ships with food on them, and he had sole charge of those ships and directing them, and in sending the commodities under my instructions to governments and deliveries against the relief appropriations to governments. I had charge of all commodities in ships that went over there.

Q. You were directly in control of the affairs of the United States Grain Corporation in Europe?

A. Yes.

48 Q. Including Bulgaria?

A. Yes.

Q. And he was acting under your direction and instructions?

A. Yes.

Q. Where were you during September, 1919?

A. September, 1919—that is pretty hard for me to say.
Q. Were you in Europe?
A. I was in Europe, yes.
Q. Were you always in touch with the situation at Constanti nople.
A. Always, yes.
Q. And you could have been immediately reached and could hav advised as to any situation that might have arisen there?
A. I think I could have been reached, unless perchance that wa the time that I was in Germany; I cannot tell that.
Q. And did Mr. Galbraith communicate with you and ask fo your instructions and orders relative to the different transaction of the United States Grain Corporation?
A. Yes.
Q. And he acted on your authority or order as given in respons to those requests?
A. Yes, sir.

Plaintiff's Proof.

Mr. Whitehouse: I first move to amend the complaint by substi tuting the figures "$5,170,000." for "$5,200,000." in paragraph 1(of the complaint.
The Court: That is granted.
Mr. Whitehouse: And "$51,700." for $52,000." in paragraph 1(of the complaint.
49 The Court: That is also granted.
Mr. Whitehouse: And "$51,700." for $52,000." in the de mand for judgment.
The Court: Yes.
Mr. Whitehouse: And after the demand as amended "with interes from October 6, 1919."
Mr. Glenn: No objection.
The Court: That is granted.
Mr. Whitehou-e: I want to move, and I suppose this motion should have preceded the testimony——
The Court: You need not mind that.
Mr. Whitehouse: I want to move to strike out the first separate defense in the answer on the ground that it is insufficient in law upon the face thereof.
The Court: I will deny that and give you an exception so that you may have a record.
Mr. Whitehouse: I make the same motion as to the second separate defense.
The Court: I will deny that and give you an exception.
Mr. Whitehouse: It is stipulated that the value of the gold trans ported from Constantinople to New York was $5,170,000. in Amer ican gold, and that the usual percentage or freight rate was one per cent of the value of the gold.
That article 1510 of the Navy Regulations, 1913, was promulgated by the Secretary of the Navy pursuant to the power and authority

to do so contained in Section 1625, article 8, paragraph 13 of the United States Revised Statutes.

50 Mr. Glenn: That article is set forth in the pleadings in full.

The Court: Very good.

Mr. Whitehouse: I offer in evidence a certified copy of the certificate of the incorporation of the defendant.

Paper received in evidence and marked Plaintiff's Exhibit 1.

Mr. Glenn: As I understand, all of these are subject to the objection as to immateriality or irrelevancy.

The Court: You may regard them all as so objected to; I will deny all of those objections and give you an exception in every case.

Mr. Whitehouse: Does this Court take judicial notice of the Laws of Delaware?

The Court: All the laws of all the States.

Mr. Whitehouse: I offer in evidence a written agreement entered into between the Government of Bulgaria and the United States Food Administration, Grain Corporation, the defendant herein, dated Sofia, March 28, 1919.

Paper received in evidence and marked Plaintiff's Exhibit 2.

I offer in evidence a receipt dated April 5, 1919, signed "United States Food Administration, Grain Corporat-on, by Howard Hines, Agent," which is a receipt for part of the gold which is the subject of this action.

Paper received in evidence and marked Plaintiff's Exhibit 3.

It is Stipulated that the Government of Bulgaria failed to
51 secure credit in New York as provided for by paragraph 2 of Plaintiff's Exhibit 2, within two months after the execution of that agreement, and the gold which is the subject of this action became the property of the defendant some time prior to its being loaded upon the United States Ship "Laub."

It is Further Stipulated that at all the times the United States Ship "Laub" was at Constantinople, Turkey, Admiral Mark Bristol was Senior United States Naval Officer in Turkish waters located at Smyrna, Turkey, and Captain J. W. Greenslade was Senior Officer at Constantinople and the superior officer of the plaintiff.

That on or about September 10, 1919, Captain Greenslade ordered Lieutenant-Commander Phillips to take on board the United States Ship "Laub" from the United States Ship "Galveston" the gold——

The Court: Is not this all in the complaint?

Mr. Whitehouse: No, sir; there is nothing to this effect.

The gold which the defendant had received from Bulgaria pursuant to Plaintiff's Exhibit 2, and to await written orders as to the movement of said vessel from Admiral Bristol.

On the 15th day of September, 1919, the plaintiff took said gold on board and thereafter and on the same date received written orders from Admiral Bristol.

—. Have you a copy of the written order, No. 46, Mr. Glenn?

Mr. Glenn: Yes.

52 Mr. Whitehouse: I offer in evidence "Movement Order No. 46," dated September 15, 1919, addressed to Lieutenant-Commander Wallace B. Phillips and signed Mark L. Bristol.

Paper received in evidence and marked Plaintiff's Exhibit 4.

Mr. Whitehouse: It is stipulated that upon the arrival of the United States Ship "Laub" at New York and before the gold was delivered to the defendant, the plaintiff demanded of the defendant the usual percentage for freight which the defendant has failed and refused to pay to the plaintiff.

It is further stipulated that the defendant conducted its business in its own name, made its contracts in its own name, and assumed its own obligations. Its funds were deposited in banks in its own name, and its general business included the purchase and sale of food products, a number of which were made in foreign countries and that its business as a whole resulted in a profit.

Mr. Glenn: May I call attention to this fact, that our friend is reading parts of stipulations. There are other sentences in there that are of equal importance to us. Now I want to put the whole stipulation in evidence.

The Court: You may put them all in.

Mr. Whitehouse: I did not want to introduce parts of the defense as the plaintiff's case. I rest.

Plaintiff's proofs closed.

53 *Defendant's Proof.*

Mr. Glenn: Your Honor, to save the time of the Court and subject to a motion to dismiss the plaintiff's case at the close of his evidence as not sufficient in law——

The Court: I would overrule that; it would not be any good unless you rested.

Mr. Glenn: We shall put in evidence the stipulation entered into between the parties with the documents attached. One of these documents is already in evidence but it cannot do any harm to go twice. For instance, Plaintiff's Exhibit 4 is already in evidence, so that if you will look with me, Mr. Whitehouse we will just put them in. Now this is the first one. There are no exhibits in that; I offer that in evidence.

Paper received in evidence and marked Defendant's Exhibit A.

Mr. Glenn: It is noted at the top here as Stipulation No. 1. We offer as another stipulation which will be Exhibit B this one which is called Stipulation No. 2 here.

Paper received in evidence and marked Defendant's Exhibit B.

We offer another stipulation as Exhibit C which is called here Stipulation No. 3.

Paper received in evidence and marked Defendant's Exhibit C.

Mr. Glenn: One of these exhibits is already in evidence as movement Order No. 46. We offer a fourth stipulation as Exhibit
54 D, which is called here Stipulation 4, and with whatever is attached to it.

Paper received in evidence and marked Defendant's Exhibit D.

Mr. Glenn: Your Honor, you of course will take judicial notice of the Food Control Act?

The Court: Of all the acts.

Mr. Glenn: We offer in evidence because we are not sure you can take notice of it otherwise, the executive orders, the proclamations of the President under this Statute. We have them here in very convenient form including the statute itself, so we might mark them both even though they do include the statute.

The Court: Yes.

Papers received in evidence and marked Defendant's Exhibit- E and F.

Mr. Glenn: One of these stipulations provides that the ownership of stock in the defendant company may be shown by a statement of counsel, so I will make the statement.

The defendant has issued and outstanding capital stock for the whole amount of the capitalization. At that time, at the time of the events in this action, it was $500,000,000. All of that stock all of the certificates, are in the possession of the United States Government.

The Court: The Secretary of the Treasury?

Mr. Glenn: As I am informed the Treasurer, and all of those certificates stand in the name of the United States Government with the exception of certificates qualifying Directors, those certificates being endorsed in blank and likewise held.

55 I further state that that has been the case since the organization of this company in the year 1917, the only change that occurred in the interval being the increase of its capital stock. The stock was subscribed and paid for in cash at par by the United States Government, and the increased stock was likewise subscribed and paid for in cash at par by the Government. There is no private ownership of a share of stock of the company. That concludes our evidence.

Mr. Whitehouse: The stipulations that have gone in, if your Honor please, have attached to them a number of exhibits to each one of which I want specific objections.

The Court: Very good; you take an objection to each one and that objection is overruled and you may have an exception.

Mr. Whitehouse: Will that be assumed, that I have taken the proper objections?

The Court: If there are any.

Mr. Whitehouse: I mean if there are any. For instance, on some of them my objection will be that there was no proper foundation laid for them.

The Court: All right.

Mr. Glenn: You do not object to the fact; you do not claim that we should prove the fact that such a document was signed?

Mr. Whitehouse: There is no objection on the part of the plaintiff to the mode of proof as to any of these exhibits but there would be different grounds of objections to some of them.

56 The Court: You may object to them for any ground you choose afterwards to put in the record, except to their authenticity.

Mr. Glenn: And the fact that they were signed.

The Court: Every objection may be entered on the record of the plaintiff except to the authenticity of the documents and exception is given to him for overruling the objections.

Mr. Glenn: The authenticity of the documents or the authority of the party signing them. It seems to me we have it here, the competency of the facts,——

Mr. Whitehouse: We stipulate that there is no objection to the mode of proof.

The Court: You may take every objection not foreclosed by the stipulation.

Mr. Glenn: That will cover it.

Mr. Whitehouse: You did not introduce in evidence the executive order of March 1, 1919.

Mr. Glenn: Yes, I think that is right in that printed book but if it is not you can put it in.

Mr. Whitehouse: You see, I have copies of these executive orders given to me by the defendant and then the defendant brings a lot of books in here and it tends to confuse me.

Mr. Glenn: You can mark yours in evidence.

Mr. Whitehouse: Can we stipulate this so as to save the time of the Court, that all the executive orders of the President may be considered as introduced into evidence?

Mr. Glenn: Absolutely; any that he ever made since 1911

57 The Court: I will take notice of those on that stipulation.

Mr. Whitehouse: I offer in evidence a letter dated September 15, 1919, addressed to Major L. C. Galbraith and signed Lieutenant-Commander W. B. Phillips United States Navy, the original of which is conceded was given to Major L. C. Galbraith by the plaintiff on the 15th day of September, 1919, after the gold was on board the United States Ship "Laub" and after having received the so-called Galbraith release.

Mr. Glenn: That is already attached to the stipulation we put in evidence.

Mr. Whitehouse: It will not do any harm to have it in again.

Paper received in evidence and marked Plaintiff's Exhibit 5.

The Court: Now the case is closed and each side moves for a verdict, I understand.

Mr. Whitehouse: Each side moves for a direction of a verdict which may be rendered by the Court with or without a jury.

The Court: No; I will have to direct a verdict.

(Argument had in respect to respective motions for the direction of a verdict.)

The Court: Decision reserved.

58

New York, December 16th, 1920.

On the above date Mr. Clarke, Esq., of Counsel for plaintiff, and Mr. Glenn and Mr. Jones, Esqs., of Counsel for defendant, appeared by appointment before Justice Learned Hand.

A motion was made by the attorneys for both parties for a direction of a verdict.

The motion of plaintiff's attorneys was denied and that of defendant's attorneys was granted.

The Court thereupon directed a verdict for defendant.

An exception was taken by Counsel for plaintiff which was granted.

Counsel for plaintiff then moved to have the verdict set aside and for a new trial on the ground that the verdict was against the law, against the evidence and against the weight of evidence, and on the exceptions taken at the trial.

The motion was overruled and judgment on the verdict given for defendant.

Counsel for plaintiff then took an exception which was granted.

The court thereupon on request of Counsel for plaintiff granted ninety days to file a Bill of Exceptions.

59

PLAINTIFF'S EXHIBIT 1.

Certificate or Incorporation of Food Administration Grain Corporation.

First. The name of this corporation is Food Administration Grain Corporation.

Second. The location of its principal office in the State of Delaware is No. 7 West Tenth Street, in the City of Wilmington, County of Newcastle.

The name of the agent therein and in charge thereof is the Corporation Trust Company of America.

Third. This corporation is organized pursuant to an executive order issued by the President of the United States, dated August 14th, 1917, and in the exercise of the powers conferred upon him by Act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved August 10th, 1917.

The objects and purposes for which and for any of which this corporation is formed are, to do any or all of the things herein set forth to the same extent as natural persons might or could do, viz:—To purchase, or otherwise acquire, manufacture, sell or otherwise dis-

pose of, store, handle, and otherwise deal in and with grain,
60 food, feeds, and their products, and to do all acts and things necessary, expedient or incidental to the efficient conduct of said business, within or without the State of Delaware.

To exercise all powers which may be delegated to it by the President of the United States under the act of Congress, entitled, "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10th, 1917, as an agency authorized to be created under said act.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this corporation.

In general, to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the Act hereinafter referred to.

Fourth. The total authorized capital stock of this corporation is Fifty Million Dollars ($50,000,000) divided into Five Hundred Thousand (500,000) shares of One hundred dollars ($100.) each.

The amount of capital stock with which this corporation will commence business is the sum of Twenty-nine Hundred Dollars ($2,900.), being twenty-nine (29) shares of One Hundred Dollars ($100.) each.

61 Fifth. The names and places of residence of each of the original subscribers to the capital stock and the number of shares subscribed for by each are as follows:

Name.	Residence.	No. of shares.
Herbert Hoover.....	Washington, D. C.....	27
Edgar Rickard.....	Washington, D. C.....	1
Curtis H. Lindley.....	Washington, D. C.....	1

Sixth. The duration of the existence of this corporation is the period of five years unless sooner dissolved in the manner provided by law.

Seventh. The property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth. The directors of this corporation shall hold office for one year from the date of their election and until their successors are elected and qualified unless sooner removed. The holder or holders of two-thirds of the outstanding capital stock may call a special meeting of stockholders at any time, upon mailing notice to the other stockholders of the time and place of said meeting, three days prior to said appointed time, which notice may be waived by unanimous consent, or by the presence of all stockholders at said special meeting, and the stockholders present may by a majority vote remove

any director or directors from office and elect a successor or
62 successors to hold office for the remainder of the unexpired term.

In furtherance, and not in limitation, of the powers conferred by statute, the board of directors are expressly authorized to make, alter, amend, and rescind the by-laws of this corporation, and to authorize and cause to be executed mortgages and liens upon the personal property of this corporation, and to authorize the borrowing of such sums of money from time to time, and the making and execution of such notes, mortgages, pledges and liens on the personal property of this corporation, as they may deem advisable.

We, the Undersigned, being each of the original subscribers to the capital stock hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of an Act of the Legislature of the State of Delaware entitled, "An Act Providing a General Corporation Law" (approved March 10th, 1899), and the acts amendatory thereof and supplemental thereto, do make and file this certificate hereby declaring and certifying that the facts herein stated are true, and do respectively agree to take the number of shares of stock hereinbefore set forth, and accordingly have hereunto set our hands and seals this 14th day of August, A. D., 1917.

63

HERBERT HOOVER. [SEAL.]
EDGAR RICKARD. [SEAL.]
CURTIS H. LINDLEY. [SEAL.]

In presence of

LEWIS L. STRAUSS, JR.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered that on this 14th day of August, A. D. 1917, personally came before me a Notary Public for the District of Columbia, Herbert Hoover, Edgar Rickard and Curtis H. Lindley, parties to the foregoing certificate of incorporation, known to me personally to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

[Seal of William Osborn, Notary Public, District of Columbia.]

WILLIAM OSBORN,
Notary Public, D. C.

64 State of Delaware,

Office of Secretary of State.

I, Everett C. Johnson, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Food Administration Grain Corporation," as received and filed in this office the sixteenth day of August, A. D. 1917, at 9 o'clock A. M.

In testimony whereof, I have hereunto set my hand and official seal, at Dover, this sixteenth day of July, in the year of our Lord One thousand nine hundred and twenty.

[SEAL.] EVERETT C. JOHNSON,
Secretary of State.

65 PLAINTIFF'S EXHIBIT 2.

Sofia, March 28, 1919.

Agreement Between the Bulgarian Government and the United States Food Administration Grain Corporation.

It is understood and agreed between the Bulgarian Government and Howard Heinz, Agent of the United States Food Administration Grain Corporation, that:

The U. S. Food Administration Grain Corporation undertakes to deliver at the Port of Varna approximately 14,000 metric tons of American first grade pure wheat flour under the following conditions:

I. The Bulgarian Government is to deliver aboard a United States steamer, to be designated, free of all costs the sum of 650,000 pounds sterling gold or its equivalent in Napoleon's gold. Said gold to be receipted for by authorized representative of the United States Food Administration Grain Corporation upon its delivery.

II. The U. S. Food Administration Grain Corporation agrees to hold above-mentioned gold at Constantinople as security for the value of said flour. If at any time within two months the Bulgarian Government has secured credit in dollars in New York sufficient to pay all bills for said flour plus expenses, then the U. S. Food Administration Grain Corporation agrees to return said gold when notified that such credits have been deposited to its order in New York.

66

III. The Bulgarian Government agrees to pay 6 per cent annual interest in American dollars on all bills due the U. S. Food Administration Grain Corporation from the moment of delivery of flour at Varna until date of payment of said bills in dollars.

IV. All risks on gold deposited aboard United States boat from the moment of its written acceptance aboard said boat, to the

moment of its return at Varna and its acceptance by the Bulgarian Government are to be undertaken by the U. S. Food Administration Grain Corporation.

V. The exact value of the flour in current American dollars will be fixed later in conformance with the bill for the goods which bill will be rendered to the Bulgarian Government including freight, demurrage, and any other costs.

VI. The Bulgarian Government is to receipt for cargo C. I. F. steamers at Varna and is responsible for all unloading expense. The representatives of the Bulgarian Government and the U. S. Food Administration Grain Corporation are to have their representatives check the cargo as it is taken from the steamers.

VII. The rate of discharge of these cargoes is to be not less than one thousand tons per day not including Sundays and a demurrage charge for every day or part of a day over and above — ern-
67 ment at the current demurrage rates of the U. S. Shipping Board.

VIII. The first shipment of flour is now en route from New York and should arrive at Varna between the 10th and 15th of April.

IX. The U. S. Food Administration Grain Corporation agrees to ship certain quantities of opium, oil of roses, tobacco, and hides, consigned to the Minister of Bulgaria to the United States in New York;—shipments to be made via Constantinople or Varna on United States boats. All freight, insurance, marine risks, and other charges are to be collected in New York against cargo.

X. The U. S. Food Administration Grain Corporation will do all within its power to expedite the travel of a Bulgarian commission which now desires to go to New York via Constantinople. It is understood that this Bulgarian Commission will have charge of the sale of the Bulgarian products shipped to the Bulgarian Minister in the United States and the proceeds of sale of these products shall be used as a fund to redeem the gold referred to in paragraph 1, and also for the purchase of any additional quantities of flour or any other American materials.

[SEAL.]

A. LIAPTEHEN,
Minister of War of Bulgaria for the Government of Bulgaria.

HOWARD HEINZ,
Agent for the U. S. Food Administration Grain Corporation.

68 PLAINTIFF'S EXHIBIT 3.

U. S. S. Noma,
Varna, Bulgaria, 5 April 1919.

On Board U. S. Naval Dispatch Boat "Noma."

Received of the Bulgarian Government, the sum of Thirteen Million seven hundred thousand francs and one hundred two thousand pounds sterling, in gold coin to be held by the U. S. Food Administration Grain Corporation, as per the terms of any agreement between Bulgarian Government and the U. S. Food Administration Grain Corporation entered into at Sofia, March 28, 1919.

This receipt is executed in triplicate of which one (1) only is valid.

U. S. FOOD ADMINISTRATION GRAIN CORPORATION,
HOWARD HEINZ,
Agent,
By WILLIAM O. GOODRICH, JR.
C. S. ABBOLL.

Fcs., 13,700,000.
L., 102,000.

69 PLAINTIFF'S EXHIBIT 4.

See No. 12 Defendant's Exhibit C.

PLAINTIFF'S EXHIBIT 5.

No. —. W. B. P. / H. D. R.
File 193-19.

U. S. S. Laub.

Constantinople, Turkey, 15 September, 1919.

From: Commanding Officer, Lt. Comdr. W. B. Phillips, U. S. Navy.

To: Major L. C. Galbraith, Q. M. Corps, U. S. Army, Officer in Charge, U. S. Food Administration, Constantinople.

Subject: Release from responsibility covering shipment of gold to the United States.

Reference: (*a*) Your letter dated September 1919 to Lt. Comdr. W. B. Phillips, U. S. Navy, Commanding U. S. S. Laub.

(1) You are hereby informed that I cannot accept your release, (reference (*a*),) from responsibility covering shipment of
70 approximately five million dollars ($5,000,000) gold to the United States on this vessel.

2. The gold was received from the Commanding Officer, U. S. S. Galveston, to whom I have given receipt for same, and I take full responsibility for the transportation of the gold to the United States.

3. Copy of this letter furnished the Senior U. S. Naval Officer, Turkey.

(Sgd.) W. B. PHILLIPS,
Lt. Comdr. U. S. N.

71 DEFENDANT'S EXHIBIT A.

PHILLIPS

vs.

GRAIN CORPORATION.

The competency of the following facts, but not their materiality or relevancy, is admitted by both the plaintiff and defendant herein:

1. That at all the times that the U. S. S. Laub was stationed at Constantinople, Admiral Mark Bristol was at Smyrna, Turkey, and Captain J. W. Greenslade was Senior Officer at Constantinople, and Superior Officer of Lieutenant Commander Phillips.

2. On or about September 10, 1919, Captain Greenslade ordered Lieutenant Commander Phillips to bring the U. S. S. Laub alongside the U. S. S. Galveston at slack water on September 15, 1919, and to take on board the Laub from the Galveston the gold, which is the subject of this action, and as soon thereafter as practicable, to transport said gold to the Port of New York. At the time of receiving these orders Lieutenant Commander Phillips was informed by Captain Greenslade of the substance of Secretary Daniels' cablegram purporting to suspend the mandatory provisions of Article 1510 of the Navy Regulations.

3. On the 15th day of September, 1919, and pursuant to said orders, Lieutenant Commander Phillips took the said gold on board the Laub. Sometime thereafter, and on the same date, he
72 received the written "Movement Order No. 46", and the so-called Galbraith release.

Dated, —— —, ——.

HATCH AND CLUTE,
Attorneys for Plaintiff.
SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

73 DEFENDANT'S EXHIBIT B.

PHILLIPS

VS.

GRAIN CORPORATION.

The competency, but not their materiality or relevancy, of the following facts, is admitted by the plaintiff herein:

1. Each and every allegation contained in paragraphs designated 4, 5, 9, 10, 11, 12, 13 and 14 of the Answer herein.

2. Copies of all Executive Orders.

3. That at all the times mentioned in the Answer Josephus Daniels was Secretary of the United States Navy clothed with all the powers and duties pertaining to such office; Admiral Knapp was ranking U. S. Naval Officer in South European waters; that Rear Admiral Bristol was Senior United States Naval Officer in command in Turkish waters, and that Howard Heinz was Agent for the defendant at Sofia, Bulgaria.

4. That the number of shares of stock issued by the United States Grain Corporation and the ownership thereof may be disclosed by a statement to that effect made by the attorney for the defendant.

5. Copies, stated by the attorney for the defendant to be true copies, of the request for, and the issuing of, by the Secretary of the Navy, of what purports to be a suspension of Article 1510 of the Navy Regulations.

74 6. That the substance of the cablegram of the Secretary of the Navy purporting to suspend Article 1510 of the Navy Regulations was communicated to plaintiff prior to the receipt by him on board the U. S. S. Laub of the Bulgarian gold.

Dated, October 4, 1920.

HATCH AND CLUTE,
Attorneys for Plaintiff.
SHATTUCK, GLENN & GANTER,
Defendant's Attorneys.

75 DEFENDANT'S EXHIBIT C.

PHILLIPS

VS.

GRAIN CORPORATION.

The competency, but not their materiality or Relevancy of the following facts, is admitted by the defendant:

1. That the usual percentage for freight of gold from Constantinople to the Port of New York, at the times mentioned in the complaint, was one per cent of the value of the gold.

2. That the value of the gold transported from Constantinople to the Port of New York, as alleged in the complaint, was $5,170,000 in American gold.

3. That Article 1510, Navy Regulations 1913; was enacted by the Secretary of the Navy pursuant to the power and authority contained in Section 1624, Article 8, and paragraph XIII of the United States Revised Statutes.

4. On September 15, 1919, after the plaintiff had taken the gold on board the Laub, the same day Major L. C. Galbraith came on board the Laub and delivered to the plaintiff a document, a copy of which is hereto attached and marked Exhibit "A" and made part hereof; attached to which document was a copy of cable also hereto attached, made part hereof and designated Exhibit "B." The plaintiff, after reading these documents, gave to Major Galbraith
76 a document, of which a copy is hereto attached designated Exhibit "C" and made a part hereof, and he — demanded at that time the "usual percentage" for the transportation of the gold. Later on the same day the plaintiff received from Admiral Bristol movement order No. 46, a copy of which is hereto attached, designated Exhibit "D" and made part hereof. The "attached cable" of which said order speaks consisted of a copy of the cable from Secretary Daniels to Admiral Knapp, constituting Exhibit "B" hereof. Upon arrival of the Laub at New York, and before the delivery of the gold to the defendant, the plaintiff again demanded the "usual percentage" from the defendant.

5. The defendant has paid nothing to the plaintiff and refuses to pay anything.

6. On September 8, 1919, a document, a copy of which is hereto attached, marked Exhibit "E" and made part hereof, was received by Admiral Bristol, U. S. N., then being the Senior U. S. Naval Officer in Turkish waters, and was endorsed by Admiral Bristol and returned by him with endorsements thereon appearing.

7. That interest on the sum demanded in the complaint runs from the 6th day of October, 1919.

8. That the Act under which the United States Grain Corporation was incorporated, with amendments thereto, may be estab-
77 lished upon the trial by reference to some book or pamphlet setting forth said laws.

Dated, November 13, 1920.

SHATTUCK, GLENN & GANTER,
Attorneys for Defendant United States Grain Corporation.
HATCH AND CLUTE,
Attorneys for Plaintiff.

78 EXHIBIT A OF C.

American Food Mission for South Eastern Europe.

Office American Embassy,
Constantinople, September 15th, 1919.

Lieut-Commander Wallace B. Phillips, U. S. N.,
Commanding U. S. S. Laub,
c/o Senior U. S. Naval Officer,
Constantinople, Turkey.

DEAR SIR:

In accordance with authority invested in me by Mr. Herbert Hoover, United States Food Administrator, I hereby release yourself and the United States Government from all responsibility covering shipment of approximately five millions gold to United States from Constantinople on board the U. S. S. Laub, except such responsibility as is usually incumbent for care of public property.

Copy of cable from Secretary of Navy attached in which Department suspends mandatory provisions Article 1510 Navy Regulations.

Yours truly,

L. C. GALBRAITH,
Major, Q. M. Corps, U. S. Army.

Officer-in-charge U. S. Food Administration. 2 Incls.

79 EXHIBIT B OF C.

This consists of a copy of cable addressed by the Secretary of the Navy to Admiral Knapp dated August 16, 1919, and reading as follows:

"Your Mission 555 approved. Department suspends mandatory provisions Article 1510 Navy Regulations including percentage charges upon Commanding Officer with release for himself and the United States Government from all responsibility as per your Mission 555. Papers must be certified and signed by proper officials."

This was in response to a cable dated August 8, 1919, signed by Admiral Knapp to the Secretary of the Navy and reading as follows:

"Serial number Mission 555. Relief Administration desires ship about five millions gold to United States from Constantinople on board a destroyer and is willing to keep gold insured and release captain from all responsibility except such as is usually incumbent for care of public property. Under circumstances will department suspend mandatory provisions of Article 1510 Navy Regulations including percentage charge and direct that shipment be received for transportation as desired."

80 EXHIBIT C OF C.

File 193-19.

W. B. P./H. D. R.

U. S. S. Laub.

Constantinople, Turkey.

15 September 1919.

From: Commanding Officer, Lt. Comdr. W. B. Phillips, U. S. Navy.

To: Major L. C. Galbraith, Q. M. Corps, U. S. Army, Officer in charge, U. S. Food Administration, Constantinople, Turkey.

Subject: Release from responsibility covering shipment of gold to the United States.

Reference: (*a*) Your letter dated September 1919 to Lt. Comdr. W. B. Phillips, U. S. Navy, Commanding, U. S. S. Laub.

1. You are hereby informed that I cannot accept your release, (reference (*a*)), from responsibility covering shipment of approximately five million dollars ($5,000,000) gold to the United States on this vessel.

81 2. The gold was received from the Commanding Officer, U. S. S. Galveston, to whom I have given receipt for same and I take full responsibility for the transportation of the gold to the United States.

3. Copy of this letter furnished to Senior U. S. Naval Officer, Turkey.

W. B. PHILLIPS,
Lt. Comdr., U. S. N.

82 EXHIBIT D OF C.

G. M. T./W. J. C.

Con. 5591-19.

U. S. S. Scorpion, Flagship,
Smyrna, Turkey,
15 September, 1919.

Movement Order No. 46.

Force: U. S. S. Laub, Lieutenant Commander Wallace B. Phillips, U. S. Navy, Commanding.

1. At 8.00 P. M. Monday, September 15, 1919, or as soon thereafter as practicable, proceed to New York, N. Y. Upon arrival at that port report to the Senior U. S. Naval Officer Present, and inform Bureau of Navigation (Operations) your arrival by dispatch.

2. In accordance with Article 8, of the Articles for the Gover
ment of the Navy of the United States, and Article 1510, U. S. Na
Regulations, 1913, you are authorized to receive on board the ves
under your command, prior to your sailing, for transportation
New York, such funds in gold, as are now stored on board the U.
S. Galveston. This gold is the property of the United Stat
83 Food Administration (Grain Corporation). Major J. C. Ga
braith, Quartermaster Corps, United States Army, in charg
of the United States Food Administration, Constantinople, will a
company you as a passenger from Constantinople to New Yor
Upon your arrival at New York you will make such disposition
this gold as may be requested by Major Galbraith.

3. In accordance with Article 1510, U. S. Navy Regulations, 191
I hereby assume joint responsibility with the Commanding Office

4. You are authorized to delay at Messina and the Azores for fu
and stores as necessary.

5. Obtain necessary routing instructions from the U. S. Nava
Port Officer, Constantinople, prior to your departure.

6. Your attention is called to the attached cable which waives th
mandatory provisions of Article 1510, Navy Regulations, 1913.

MARK L. BRISTOL.

84 EXHIBIT E OF C.

Con. 5592-19.

American Food Mission

for

South Eastern Europe.

Office American Embassy.

Constantinople, Sept. 8th, 1919.

Senior U. S. Naval Officer,
Turkey.

DEAR SIR:

In accordance with telegraphic instructions from Mr. Herbe
Hoover, U. S. Food Administrator, I respectfully request that a d
stroyer en route to the United States be designated to transport ce
tain funds in gold from Constantinople to New York. This gold b
ing the property of the United States Food Administration Gra
Corporation and is now stored on board the U. S. S. Galveston.

Very respectfully,

I. C. GALBRAITH.

L. C. Galbraith,
Major Q. M. Corps, U. S. Army,
Officer in Charge, U. S. Food Administration.

85 1st Endorsement: U. S. S. Scorpion, Flagship, Smyrna, Turkey 8 September 1919.
From: Senior U. S. Naval Officer, Turkey.
To: Major L. C. Galbraith, Q. M. C., U. S. Army.

1. Returned.

2. The U. S. S. Laub will be designated as the destroyer to carry this gold.

Mark L. Bristol.

86 DEFENDANT'S EXHIBIT D.

PHILLIPS

v.

U. S. GRAIN CORPORATION.

Competency of the Following Facts, but not Their Materiality or Relevancy is Admitted by Both the Plaintiff and Defendant Herein:

1. That all the officers and directors of the United States Grain Corporation were selected with the consent and approval of the President of the United States in accordance with the executive order of the President, dated August 14th, 1917.

2. The plaintiff's immediate superior officer at Constantinople was Captain Greenslade. Captain Greenslade's immediate superior officer was Admiral Bristol and Admiral Bristol's superior officer was Admiral Knapp.

3. That defendant, United States Grain Corporation insured the gold while the same was on board the "Laub" and kept the same insured during its transportation.

4. Major Galbraith U. S. A. in accordance with movement order #46 issued by Admiral Bristol on September 15, 1919, accompanied the plaintiff on the "Laub" on the voyage from Constantinople to New York. On the vessel's arrival at New York, the plaintiff made due delivery of said gold to defendant.

87 5. That the defendant received from Galbraith an account of his travelling expenses while at Constantinople and paid the same.

6. Under date of August 12th, 1919, Admiral Bristol delivered to Major Glbraith a communication, of which a copy is hereto annexed and marked Exhibit "A".

7. United States Grain Corporation conducted its business in its own name and made its own contract and assumed its own obligations. It engaged and paid its own employees, although occasionally would utilize the services of a person already in the government

service, such as an army or navy officer, when such officer should b assigned or detailed to the performance of duties in the interest of on behalf of the corporation. It deposited its funds in banks in i own name. Its activities included purchasing and selling fo products, and a number of these sales were made in foreign countri and some to foreign countries for relief purposes. Its corpora affairs, considered as a whole, resulted in a profit which will b available to its stockholder United States Government by way distribution.

8. Bulgaria failed to secure credit in New York sufficiently to p for the flour delivered under the contract of March 28, 1919, pl expenses within two months after the execution of said contra and the gold which was deposited pursuant to said contra
88 as security became the property of the United States Grai Corporation sometime prior to the loading of said gold board the S. S. Laub for transportation to New York.

9. That Edwin M. Flesh, Vice President of the defendant, may b called as a witness on behalf of the defendant and that his testimon shall be confined to proving the agency of Major Galbraith as age for the defendant herein.

HATCH AND CLUTE,
Attorneys for Plaintiff.
SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

89 EXHIBIT "A" OF D.

G. M. T.-G.

U. S. S. Galveston, Flagship,
Constantinople, Turkey,
12 August, 1919.

From: Senior U. S. Naval Officer, Turkey.
To: United States Food Administration (Grain Corporation) Major L. C. Galbraith, U. S. Army, Constantinople, Turkey.
Subject: Bulgarian gold, storage of, charges for.
Reference: United States Navy Regulations Article 8, paragraph 13 and Article 1510.

1. In accordance with the above references I hereby claim th proper percentage as charges for storage of $3,107,945.50 aboard th U. S. S. Scorpion from June 4, 1919 to July 22, 1919, when thi gold was transferred to the U. S. S. Galveston.

2. As this gold was actually turned over by the Bulgarian Govern ment to the United States Food Administration (Grain Corporation and as it has been insured by private firms in London, Eng
90 land, it cannot be considered as United States Governmen property and must therefore be considered as private property belonging to a private corporation. Article 1510 in the Unite

States Navy Regulations explicitly states what the actions of Naval Forces shall be as regards storage for gold and nothing can relieve the Commanding Officer of a Naval vessel from his responsibility for such property as may be placed on his ship for storage.

3. The rate charged for storage of gold is $1.00 per $1,000.00 per month. It is requested that payments at this rate be made.

(s.) MARK L. BRISTOL.

1st Indorsement: From L. C. Galbraith, Major Q. M. C., U. S. A., Officer in Charge, Food Administration Grain Corporation, Constantinople, Turkey—August 15, 1919—to—Mr. Herbert Hoover, Director General, Allied World Relief, Paris, France.

1. Forwarded for necessary action.

L. C. GALGRAITH,
Major, Q. M. C., U. S. A.,
Officer in Charge.

C. C.-Flesh, London.
Constantinople.

91 DEFENDANT'S EXHIBITS "E" and "F."

Executive Order for Organization of the United States Food Administration.

No. 1.

Under the provisions of the Food Control Bill the President issued an executive order on August 10, 1917, creating the Food Administration and appointing Herbert Hoover as United States Food Administrator, as follows:

Whereas, * * *

There is hereby established a governmental organization to be known as and called United States Food Administration.

Said organization shall consist of an officer designated as United States Food Administrator, and such subordinate assistants and employees as may by selected by him for service in the city of Washington, D. C., and elsewhere with the consent and approval of the President and under such rules and regulations as may from time to time be prescribed.

Herbert Hoover is hereby appointed United States Food Administrator, such appointment to take effect from this date.

Said United States Food Administrator shall hold office during the pleasure of the President.

Said United States Food Administrator shall supervise, direct and carry into effect the provisions of said act, and the powers and authority therein given to the President, so far as the same
92 apply to foods, feeds, and their derivative products and to any and all practices, procedure, and regulations authorized or required under the provisions of said Act, including the issuance,

regulation, and revocation, in the name of said Food administrator, of licenses under said act; and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time.

He shall also have the authority to make use of the services of legal counsel and employ and fix the compensation of such counsel as may from time to time be deemed by him necessary for the purpose of aiding him in carrying this act into effect.

And, whereas, the President is further authorized in carrying out the purpose of said act—

"to utilize any department or agency of the Government and to coordinate their activities so as to avoid preventable loss or duplication of effort or funds,"

All departments and established agencies of the Government are hereby directed to cooperate with the United States Food Administrator in the performance of his duties as hereinbefore set forth and to give said Administrator such support and assistance as may be requisite or expedient to enable him to perform his said duties and avoid duplication of effort and expenditure of funds. * * *

93 NOTE.—The * * * at the end of each Executive order simply indicate the omission of the formal subscription.

Executive Order for the Organization of the Food Administration Grain Corporation.

No. 2.

Whereas, under and by virtue of an Act of Congress entitled "An Act to provide for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved August 10, 1917, it is provided among other things as follows:

"That, by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel, including fuel oil and natural gas, fertilizer and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds, and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopo-
94 lization, hoarding, injurious speculation, manipulation, and private controls, effecting such supply, distribution and movement; and to establish and maintain, Governmental control of such necessaries during the war. For such purposes, the instru-

mentalities, means, methods, powers, authorities, duties, obligations and prohibitions hereinafter set forth are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."

"That, in carrying out the purposes of this Act, the President is authorized * * * to create and use any agency or agencies * * *."

"That, the President is authorized from time to time to purchase, to store, to provide storage facilities for and to sell for cash at reasonable prices, wheat, flour, meal, beans and potatoes."

And, whereas, in order to enable the United States Food Administration acting under the direction of the President, to efficiently exercise the authority granted by said Act, and to purchase, store, provide storage facilities for and to sell for cash at reasonable prices, the commodities above named, and to enable said United States Food Administration to purchase and sell said commodities in the manner and by methods customarily followed in the trade, it is ex-
95 pedient and necessary that a Corporation should be organized, all the stock of which, except the number of shares necessary to qualify directors or incorporators, shall be subscribed for, purchased and owned by the United States.

Now, therefore, Under and by virtue of the power conferred upon me by the above entitled Act as hereinbefore set forth, it is hereby ordered that an agency, to wit, a corporation, under the laws of Delaware, be created, said corporation to be named Food Administration Grain Corporation.

That the governing body of said Corporation shall consist of a board of Directors composed of seven members.

That the following persons, having been invited and given their consent to serve shall be named as four of the said directors to wit:

Herbert Hoover, of Washington, D. C.

Julius H. Barnes, of Duluth, Minn.

Gates W. McGarrah, of New York City.

Frank G. Crowell of Kansas City, Mo.

The remaining three shall be named by the incorporators and be subject to change by and with the approval of the President.

The office and principal place of business of said corporation outside the state of Delaware shall be at the City of New York, and branch offices shall be established at such places within the United States as may be selected and determined by the United States Food Administrator, by and with the consent of the President.

That the capital stock of such corporation shall consist of
96 500,000 shares of the par value of $100.00 each.

That the United States shall purchase from time to time, at par, so much of said capital stock as may be deemed necessary to supply the necessary capital to enable said corporation to carry on its business and none of said capital stock shall be sold to any person other than the United States and to the individual directors or incorporators, for the purpose of qualifying as such directors or

incorporators, such qualifying shares to be held by said directors or incorporators in trust for the use and benefit of the United States.

The United States Food Administrator is hereby directed to cause said corporation to be formed, with the powers contained in the articles or certificate of incorporation, and in the by-laws requisite and necessary to define the methods by which said corporation shall conduct its business, which have been approved by the President.

All officers of said corporation shall be selected with the consent and approval of the President.

The United States Food Administrator is hereby authorized and directed to subscribe for and purchase all of said capital stock in the name of and for the use and benefit of the United States, and as purchased, to pay for the same out of the appropriation of $150,000,000 authorized by Section 19 of the Act of Congress hereinbefore entitled.

97 Done in the District of Columbia this fourteenth day of August in the year of Our Lord One thousand Nine hundred and Seventeen and of the Independence of the United States of America, the One Hundred and Forty-second.

(Signed) WOODROW WILSON.

The White House, 14 August, 1917.

Food Administration Grain Corporation Designated as United States Agency to Purchase Wheat.

No. 3.

By proclamation of June 21, 1918, the Food Administration Grain Corporation was appointed agent of the United States to purchase wheat, and also its capital stock was increased to $150,000,000. The Proclamation follows:

Whereas * * *

By Section 14 of the Act of Congress of August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," it is provided that whenever the President shall find that an emergency exists requiring stimulation of the production of wheat, and that it is essential that

98 the producers of wheat produced within the United States shall have the benefits of the guarantee provided for in that section, he shall determine and fix and give public notice of a guaranteed price for wheat; and that thereupon the Government of the United States guarantees to every producer of wheat that he shall receive under conditions named, a price for wheat not less than such guaranteed price. Under this provision an Executive proclamation was issued on February 21, 1918, making the necessary findings and fixing guaranteed prices for wheat when delivered at certain specified primary markets.

It is further provided that for the purpose of making any guaranteed price effective under that section, or whenever he deems it

essential in order to protect the Government of the United States against material enhancement of its liabilities arising out of any guarantee under this section, the President may in his discretion purchase any wheat for which a guaranteed price shall be fixed under this section, and may hold, transport, or store it, or sell, dispose of, and deliver the same to any citizen of the United States or to any Government engaged in war with any country with which the Government of the United States is or may be at war or to use the same as supplies for any department or agency of the Government of the United States.

It is further provided by section 11 of said Act of Congress, that the President may from time to time purchase, store, provide
99 storage facilities for, and sell for cash at reasonable prices, wheat, flour, meal, beans and potatoes; and by section 2 that in carrying out the purposes of such Act, the President may create or use any agency or agencies, and utilize any department or agency of the Government.

Acting under the authority of the foregoing provisions, I hereby designate the Food Administration Grain Corporation, a corporation created in accordance with the provisions of said Act of Congress and Executive Order dated August 14, 1917, as the agency of the United States to carry out and make effective subject to the control and direction of the United States Food Administrator, the provisions of the guarantee hereinbefore referred to, and to purchase, hold, transport, store, provide storage facilities for, sell, dispose of, and deliver wheat as provided in sections 11 and 14 of said Act. I further direct that in order to make said guarantee effective and maintain the price of wheat to the grower at not less than the guarantee basis the said corporation shall offer and stand ready to purchase, and shall purchase to the full extent of its ability and available funds, all wheat tendered to it by any producer thereof at any primary market named in said proclamation of February 21, 1918, at the guaranteed price named therein for such market, provided that with the approval of the United States Food Administrator the said corporation may pay any higher prices than the guaranteed basis for any grade of wheat in any given market, and may extend its offer to purchase to other holders of wheat on such conditions as it sees fit.

100 I further direct that for such purpose the capital stock of such corporation be increased to 1,500,000 shares of the par value of $100.00 each; that the United States purchase from time to time at par, so much of the additional capital stock as may be required to supply the necessary capital to enable said corporation to carry out the provisions of this order, and that none of said additional capital stock shall be sold to any person other than the United States. The United States Food Administrator is hereby authorized and directed to subscribe for and purchase all or any part of said additional capital stock in the name of and for the use and benefit of the United States, and to pay for the same out of the appropriation of $150,000,000 authorized by section 19 of the Act of Congress hereinbefore entitled. I further authorize said corporation to bor-

row such sums of money, upon the security of wheat or flour owned by it, as may be required to carry out the provisions of this order. * * *

Acting under the authority of this proclamation the Grain Corporation, June 24, 1918, increased its capital stock to $150,000,000.

Advanced Railroad Rates Changed 1918 Price Schedule

The schedule of prices originally fixed for the 1918 crop was changed by the advance in railroad rates and by certain
101 assurance from the Shipping Board of tonnage to be furnished at Pacific Coast ports and at certain rates of freight at Atlantic ports and also for the purpose of making effective the $2.00 guaranteed to all producers. On July 1st, 1918, the following prices at the different buying markets became effective instead of those which had been proclaimed by the President:

New York, New York, two dollars and thirty-nine and a half cents ($2.39½) per bushel.

Philadelphia, Pennsylvania, two dollars and thirty-nine cents ($2.39) per bushel.

Baltimore, Maryland, two dollars and thirty-eight and three-quarter cents ($2.38¾) per bushel.

Newport News, Virginia, two dollars and thirty-eight and three-quarter cents ($2.38¾) per bushel.

Duluth, Minnesota, two dollars and twenty-two and one-half cents ($2.22½) per bushel.

Minneapolis, Minnesota, two dollars and twenty-one and one-half cents ($2.21½) per bushel.

Chicago, Illinois, two dollars and twenty-six cents ($2.26) per bushel.

St. Louis, Missouri, two dollars and twenty-four cents ($2.24) per bushel.

Kansas City, Missouri, two dollars and eighteen cents ($2.18) per bushel.

Omaha, Nebraska, two dollars and eighteen cents ($2.18) per bushel.

102 New Orleans, Louisiana, two dollars and twenty-eight cents ($2.28) per bushel.

Galveston, Texas, two dollars and twenty-eight cents ($2.28) per bushel.

Tacoma, Washington, two dollars and twenty cents ($2.20) per bushel.

Seattle, Washington, two dollars and twenty cents ($2.20) per bushel.

Portland, Oregon, two dollars and twenty cents ($2.20) per bushel.

Astoria, Oregon, two dollars and twenty cents ($2.20) per bushel.

San Francisco, California, two dollars and twenty cents ($2.20) per bushel.

Los Angeles, California, two dollars and twenty cents ($2.20) per bushel.

Salt Lake City, Utah, two dollars $2.00) per bushel.
Great Falls, Montana, two dollars ($2.00) per bushel.
Pocatello, Idaho, two dollars ($2.00) per bushel.
Spokane, Washington, two dollars ($2.00) per bushel.

Fixing Guaranteed Price for 1919 Wheat Crop.

On September 2d, 1918, the President issued proclamation fixing the guaranteed price for the 1919 wheat crop as follows:

Whereas, * * *

Now therefore, I, Woodrow Wilson, President of the United States, by virtue of the powers conferred upon me by said Act of Congress, and specially by section 14 thereof, do hereby
103 find that an emergency exists, requiring stimulation of the production of wheat, and that it is essential that the producers of wheat produced within the United States shall have the benefits of the guarantee provided for in said section; and in order to make effective the guarantee by Congress for the crop of nineteen hundred and nineteen and to assure such producers a reasonable profit. I do hereby determine and fix, and give public notice of reasonable guaranteed prices for No. 1 Northern Spring Wheat and its equivalents at the respective principal primary markets as follows, to wit:

New York, New York, two dollars and thirty-nine and a half cents ($2.39½) per bushel.

Philadelphia, Pennsylvania, two dollars and thirty-nine cents ($2.39) per bushel.

Baltimore, Maryland, two dollars and thirty-eight and three-quarter cents ($2.39¾) per bushel.

Newport News, Virginia, two dollars and thirty-eight and three-quarter cents ($2.38¾) per bushel.

Duluth, Minnesota, two dollars and twenty-two and one-half cents ($2.22½) per bushel.

Minneapolis, Minnesota, two dollars and twenty-one and one-half cents ($2.21½) *cents* per bushel.

Chicago, Illinois, two dollars and twenty-six cents ($2.26) per bushel.

104 St. Louis, Missouri, two dollars and twenty-four cents ($2.24) per bushel.

Kansas City, Missouri, two dollars and eighteen cents ($2.18) per bushel.

Omaha, Nebraska, two dollars and eighteen cents ($2.18) per bushel.

New Orleans, Louisiana, two dollars and twenty-eight cents ($2.28) per bushel.

Galveston, Texas, two dollars and twenty-eight cents ($2.28) per bushel.

Tacoma, Washington, two dollars and twenty cents ($2.20) per bushel.

Seattle, Washington, two dollars and twenty cents ($2.20) per bushel.

Portland, Oregon, two dollars and twenty cents ($2.20) per bushel.

Astoria, Oregon two dollars and twenty cents ($2.20) per bushel.

San Francisco, California, two dollars and twenty cents ($2.20) per bushel.

Los Angeles, California, two dollars and twenty cents ($2.20) per bushel.

Salt Lake City, Utah, two dollars ($2.00) per bushel.

Great Falls, Montana, Two dollars ($2.00) per bushel.

Pocatello, Idaho, two dollars ($2.00) per bushel.

Spokane, Washington, two dollars ($2.00) per bushel.

and that the guaranteed price for the other grades estab-
105 lished under the United States Grain Standards Act approved August 11, 1916, based on said price for No. 1 Northern Spring Wheat at the respective principal primary markets of the United States above mentioned, will assure the producers of wheat produced within the United States a reasonable profit; the guaranteed prices in the principal primary markets above mentioned being fixed by adopting No. 1 Northern Spring Wheat or its equivalent at the principal interior markets, as the basis.

For the purposes of such guarantee only, I hereby fix the guaranteed prices at the respective principal primary markets above mentioned for the following grades of wheat, to wit: No. 1 Northern Spring, No. 1 Hard Winter, No. 1 Red Winter, No. 1 Durum, No. 1 Hard White. The guaranteed prices at the respective principal primary markets aforesaid of all other grades of wheat established under the United States Grain Standards Act approved August 11, 1916, shall be based on the above guaranteed prices and bear just relation thereto.

The sums thus determined and fixed are guaranteed by the Government of the United States at the respective principal primary markets of the United States above mentioned to every producer of wheat of any grade so established under the United States Grain Standards Act, upon the condition that said wheat is harvested in the United States during the year 1919, and offered for sale before the first day of June, 1920, to such agent or employee of the United
States, or other person as may be hereafter designated, at
106 any one of the above-mentioned cities, which are hereby declared to be the principal primary markets of the United States, and provided that such producer complies with all regulations which may be hereafter promulgated in regard to said guarantee by the President of the United States. * * *

Grain Corporation to Operate in Europe.

Establishing American Relief Administration.

No. 4.

On December 23, 1918, the President formally approved the request of Herbert Hoover that the Grain Corporation be authorized to extend its sphere of operations outside of United States territory.

On March 1, the President issued an executive order empowering the director of the American Relief Administration to employ the Grain Corporation as its agent in handling and distributing European supplies.

In pursuance of an Act entitled, 'An Act for the relief of such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, Bulgaria, and Turkey, as may be determined upon by the President as necessary," approved February 24, 1919, I hereby direct that the furnishing of foodstuffs and other urgent supplies and the transportation, distributing
107 and administration thereof, provided for in said Act, shall be conducted under the direction of Herbert Hoover, who is hereby appointed Director General of the American Relief Administration with full power to determine to which of the populations named in said Act the supplies shall be furnished and in what quantities, and further to arrange for reimbursement so far as possible, as in said Act provided. He is hereby authorized to establish the American Relief Administration for the purpose of carrying out the provisions of said Act and to employ such persons and incur such expenses as may be necessary for such purpose, to disburse all sums appropriated under the aforesaid act of February 24, 1919, and appoint a disbursing officer with the power; and particularly to employ the Food Administration Grain Corporation, organized under the provisions of the Food Control Act of August 10, 1917, as an agency for the purpose of transportation and distribution of foodstuffs and supplies to the populations requiring relief. He is hereby further authorized in the carrying out of the aforesaid Act of February 24, 1919, to contract with the Food Administration Grain Corporation or any other person or corporation, that such person or corporation shall carry stocks of food in transit to Europe, and at points in Europe, in such quantities as may be agreed upon and as are required to meet relief needs, and that there shall be paid to such person or corporation in advance from the appropriation made in the aforesaid act of February 24, 1919, any sums
108 which may be required for the purchase and transportation of foodstuffs and the maintenance of stocks.

(Signed) WOODROW WILSON.

Executive Orders and Proclamations under Act of March 4, 1919.

Executive Order Appointment Wheat Director.

No. 5.

I, Woodrow Wilson, President of the United States of America, pursuant to an act of Congress entitled "An Act to provide further for the National Security and Defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved August 10, 1917, and an act of Congress entitled "An Act to enable the President to carry out the price guarantees made to producers of wheat of the crops of 1918 and 1919 and to protect the United States against undue enhancement of its liabilities thereunder," approved March 4th, 1919, and by virtue of the authority vested in me by said acts of Congress and each of them, as well as by virtue of any and all other acts of Congress conferring authority upon me in the premises, do hereby authorize, order and direct as follows:

109 The executive administration of the provisions of the above act in so far as they apply to the wheat and its product of the crop of 1919 and the guarantee made to producers thereof and the protection of the United States against undue enhancement of its liabilities thereunder is hereby vested in a person to be designated and called the United States Wheat Director, and I hereby appoint Julius H. Barnes as such United States Wheat Director to act as such during the pleasure of the President. I hereby authorize and direct the United States Wheat Director, to take such measures, adopt such administrative procedure, enter into such arrangements or agreements, withhold, refuse, issue, suspend and revoke such licenses and make such requisitions, orders, rules and regulations not inconsistent with law as he may from time to time deem necessary and proper for the purpose of such executive administration or as may be required in order to carry into effect this order or any orders and proclamations hereafter issued by me under the aforesaid acts or either of them in connection with such executive administration for such purpose. I vest in the United States Wheat Director all power and authority conferred upon me under the provisions of said acts applicable thereto. The United States Wheat Director shall have authority to employ and make use of the services of such agents, assistants and employees as he may deem necessary and as may be selected by him for service in connection with said executive administration with the consent and approval of the President and
110 under such rules and regulations as may from time to time be prescribed. He shall also have authority to make use of the services of legal counsel and employ and fix the compensation of such counsel as may from time to time be deemed by him necessary for the purpose of aiding him in such executive administration and in carrying the provisions of said acts into effect.

I further find it essential and hereby direct that in order to carry out the guarantees made to producers of the wheat of the crop of 1919 and to protect the United States against undue enhancement of its liabilities thereunder, the United States Wheat Director utilize the services of the Food Administration Grain Corporation as an agency of the United States and to that end I authorize the Food Administration Grain Corporation to buy and sell wheat of the crop of 1918 after June 1, 1919, and I further authorize the Food Administration Grain Corporation, subject to the approval of the United States Wheat Director, to buy or contract for the purchase of wheat of the 1919 crop at the places designated for the delivery of the same by the President's proclamation or at such other places as the United States Wheat Director may designate for cash at the said guaranteed prices and the said Food Administration Grain Corporation with approval of the United States Wheat Director is thereafter authorized to buy or contract for the purchase of for cash or sell, consign or contract for the sale of for cash or on credit wheat of the said
111 crops and flour produced therefrom at said guaranteed prices or at such other prices and on such terms or conditions as the United States Wheat Director may deem necessary or expedient or said Food Administration Grain Corporation is authorized to borrow such sums of money to enter into such voluntary agreements to make such arrangements and to do and perform such acts and things as may be necessary in order to make said guaranteed price effective and to carry out the purposes of said acts.

Inasmuch as the Food Administration Grain Corporation was formed as an agency of the United States in connection with the United States Food Administration activities under the control and direction of the United States Food Administration and since its functions will be substantially complete on June 30th, 1919, I hereby direct that Food Administration Grain Corporation close its books on June 30th, 1919, and to make a complete report as of said date, and further, that upon said date or as soon thereafter as may be practicable, it shall take the proper steps to change its corporate name from Food Administration Grain Corporation to United States Grain Corporation, under which title it shall perform such duties as hereinbefore provided or as I may hereafter direct.

I further direct that Julius H. Barnes act as a director and as an executive officer of said corporation and that the other directors and executive officers of said corporation be selected by Julius H. Barnes with the approval of the President.

112 I further direct that the authorized capital stock of said corporation be increased from 1,500,000 to 5,000,000 shares of the par value of one hundred dollars each and that the United States purchase from time to time at par so much of the additional capital stock as may be required to supply the necessary capital to enable said corporation to carry out the provisions of this order and that none of said additional stock shall be held by any person other than the United States. The United States Wheat Director is hereby authorized and directed to subscribe for and purchase at any time or from time to time all or any part of said additional capital stock

in the name of and for the use and benefit of the United States and to pay for the same out of the appropriation of one billion dollars which is provided for in Section 8 of the foregoing act of Congress approved March 4, 1919, and I direct the United States Treasurer to honor the requisition of the United States Wheat Director in this respect.

I further direct that all departments and established agencies of the Government co-operate with the United States Wheat Director in the performance of his duty as hereinbefore set forth, and to give the United States Wheat Director such support and assistance as may be requisite or expedient to enable him to perform his said duties and avoid duplication of effort and expenditure of funds.

(Signed) WOODROW WILSON.

May 14, 1919.

113 *Stipulation.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff in Error (Plaintiff Below),

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant Below).

It is hereby stipulated and agreed by and between the attorneys for the parties in the above entitled action that the foregoing Bill of Exceptions is a correct transcript of the evidence in the above entitled case and contains all the evidence in said case.

Dated, June 14th, 1921.

HATCH & CLUTE,
Attorneys for Plaintiff.
SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

114 *Order.*

United States Circuit Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff in Error (Plaintiff Below),

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant Below).

It is hereby ordered that the Bill of Exceptions be settled, signed and allowed in the foregoing form and that the same be ordered on file.

Dated, June 18th, 1921.

L. HAND,
U. S. D. J.

115 *Stipulation.*

United States District Court for the Southern District of New York.

L. 21-290.

WALLACE B. PHILLIPS, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant.

It is hereby stipulated and agreed by and between the attorneys in the above entitled action that plaintiff's time to file a Bill of Exceptions be extended from June 15th, 1921, to June 20th, 1921.

Dated, June 13th, 1921.

SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

HATCH & CLUTE,
Attorneys for Plaintiff.

So Ordered 6/13/21.
By LEARNED HAND, *U. S. D. J.*

116 *Petition.*

United States District Court, Southern District of New York.

L. 21-290.

WALLACE B. PHILLIPS, Plaintiff in Error (Plaintiff Below),

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant Below).

And now comes Wallace B. Phillips, plaintiff, herein, and says that on or about the 21st day of December, 1920, this Court entered Judgment herein in favor of the defendant, and against this plaintiff, in which Judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit, for the correction of errors so complained of, and
117 that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Circuit Court of Appeals.

HATCH & CLUTE,
Attorneys for Plaintiff.

522 Fifth Avenue, New York City, New York.

118 *Assignment of Errors.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff in Error (Plaintiff Below),

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant Below).

And now to-wit on the 15th day of June, 1921, before the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, comes the said Wallace B. Phillips, by Hatch & Clute, his attorneys, and says that in the record and proceedings aforesaid, and the judgment rendered herein, the denial of said plaintiff's motion for a new trial and the directions of his Honor, the Judge before whom the issues joined between the parties hereto were tried, as also in other respects, there is manifest error in this to-wit, that by the record aforesaid it appears:

That the said Court erred in not directing a verdict for plaintiff and in not directing a new trial for the reason:

119 1. That Section 1624, Article VIII, Sub-division 13 of the U. S. Revised Statutes unqualifiedly provides that compensation shall be paid by the shipper, when demanded, for gold taken on board a vessel for freight.

2. That Article 1510 of the Navy Regulations unqualifiedly provides that the shipper shall pay to the Commanding Officer the usual percentage when gold is placed on board of any ship for freight.

3. That Article 1510 of the Navy Regulations has the force and effect of law.

4. That the Secretary of the Navy could not suspend the provisions of Section 1624, Article VIII, Sub-Division 13, of the U. S. Revised Statutes.

5. That the Secretary of the Navy was without power or authority to suspend the provisions of Article 1510 of the Navy Regulations.

6. That the President of the United States did not approve of the suspension of the provisions of Article 1510 of the Navy Regulations.

7. That the Secretary of the Navy was without power to order the shipment of gold for freight without the Commanding Officer of the ship receiving compensation provided for by Section 1624, Article VIII, Sub-Division 13 of the U. S. Revised Statutes
120 or Article 1510 of the Navy Regulations.

8. That the order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations never became effective for the reason that the Commanding Officer of the Navy vessel "Laub" and the United States Government were not

released from all responsibility, by the defendant, as provided therein.

9. That the purported release (defendant's Exhibit C) was not certified and signed by the proper officials as provided for by the order of the Secretary of the Navy purporting to suspend Article 1510 of the Navy Regulations and was therefore illegal, null and void.

10. That Major L. C. Galbraith was not the agent of defendant.

11. That Major L. C. Galbraith signed the purported release (defendant's Exhibit C) as the agent of the U. S. Food Administration or the U. S. Food Administrator, and not as agent of the defendant.

12. That Major L. C. Galbraith was not the agent of the defendant in the matter of the transaction between Bulgaria and defendant, nor in the matter of the transportation of defendant's gold.

121 13. That Major L. C. Galbraith had neither power or authority to release for defendant the plaintiff, and the U. S. Government, from any or all responsibility in the matter of the shipment of defendant's gold.

14. That neither the U. S. Food Administrator or the U. S. Food Administration had power or authority to release for defendant the plaintiff and the U. S. Government from any and all responsibility in the matter of the shipment of defendant's gold.

15. That the order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations resulted in diminishing a Naval Officer's salary as established by law, which the Secretary of the Navy was without power or authority to do.

16. That the order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations never became effective.

17. That the order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations was inconsistent with the provisions thereof and inconsistent with the provisions of Section 1624, Article VIII, Sub-Division 13, of the U. S. Revised Statutes, and was therefore illegal, null and void.

122 18. That the American Relief Administration did not act for defendant in applying to the Secretary of the Navy for an order suspending Article 1510 of the Navy Regulations.

19. That neither the American Relief Administration, the U. S. Food Administration, nor the U. S. Food Administrator, were related to, or had any right, title or interest in or to the transaction between Bulgaria and the defendant, nor the gold received and shipped by defendant from Constantinople to New York.

20. That the purported release (defendant's Exhibit C) was the release of the U. S. Food Administration or the U. S. Food Administrator, and was not the release of the defendant.

21. That defendant was not organized or created by Act of Congress or by the express direction of Congress to incorporate.

22. That defendant was organized and existed as a trading corporation under the laws of the State of Delaware, and was subject to the same responsibilities and obligations as other corporations similarly organized.

23. That the transaction between Bulgaria and defendant was simply a commercial transaction between those parties and was not a transaction between the Government of Bulgaria and the Government of the United States.

123 24. That at the time the contract was entered into between Bulgaria and the defendant the United States Government was without either power or authority to enter into a contract with the Government of Bulgaria for the sale of foodstuffs.

25. That defendant's right and power to enter into the contract with the Government of Bulgaria were derived solely from the authority invested in defendant by the Laws of the State of Delaware.

26. That the gold which was received by defendant from the Government of Bulgaria and transported from Constantinople to New York was the property of the defendant, and not the property of the United States Government.

27. That plaintiff at no time waived any of the provisions of Section 1624, Article VIII, Sub-Division 13, of the U. S. Revised Statutes or any of the provisions of Article 1510 of the Navy Regulations.

28. That the Secretary of the Navy did not order the transportation of defendant's gold.

29. That the Secretary of the Navy did not order plaintiff to transport defendant's gold.

124 30. That the order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations was made for the benefit of the American Relief Administration and not for the benefit of the defendant.

31. That the gold of the defendant was transported from Constantinople to New York by the plaintiff pursuant to an order issued by the Superior Officer Admiral Bristol, and which order authorized plaintiff to transport the gold in accordance with Section 1624, Article VIII, Sub-Division 13 of the U. S. Revised Statutes, and Article 1510 of the Navy Regulations.

32. That plaintiff did not transport defendant's gold from Constantinople to New York pursuant to any order issued by the Secretary of the Navy.

33. That plaintiff transported the gold of defendant from Constantinople to New York pursuant to Section 1624, Article VIII, Sub-Division 13 of the U. S. Revised Statutes, and Article 1510 of the Navy Regulations.

That the said Court erred in finding:

34. That if plaintiff was under orders to carry the gold, he could not earn any commission whether Article 1510 of the Navy Regulations was suspended or not.

125 35. That the Statute and the Article together did not create any obligation against a third party.

36. That the Secretary had power to order the plaintiff to carry this gold because of the nature of defendant's business.

37. That all the property of defendant was that of the United States including the gold in question.

38. That it makes no difference that the contract between the defendant and Bulgaria was not authorized by Congress.

39. That the Secretary had the power to direct a destroyer to carry the gold, and that he meant to have Admiral Bristol designate some specific one.

40. That by not having raised the defect as to the form of the release plaintiff waived the defective release.

41. That the Secretary's order is not to be construed as requiring a release from the responsibility generally obtaining in the case of public property.

42. That plaintiff, not having objected to release on ground that it did not release him from responsibility, waived the defect.

126 43. That defendant pleaded a defense, to plaintiff's cause of action, predicated upon the theory that the Secretary ordered the shipment of the gold, etc.

44. That the defendant wishing to secure the services of a naval vessel and to avoid the supposed effect of the Naval Regulations, Article 1510, asked Admiral Knapp to cable to the Secretary of the Navy for the proper authorization.

45. That the Secretary cabled, that Department suspended the Article in question if defendant released the commanding officer and the United States from all responsibility.

46. That Representative of defendant, Major Galbraith, offered the plaintiff a release.

47. That the Secretary meant the gold to be carried and that too without commission.

48. That the defendant had been organized merely as a convenience for the exception of public purposes.

49. *The* Major Galbraith had full power locally and that the Secretary can hardly have meant by his order more than a release by the local officers.

And the said Wallace B. Phillips prays that the judgment aforesaid may be reversed and altogether held for naught, and the order denying a new trial reversed, and that he may be restored to
127 all things which he has lost by reason of the said judgment.

HATCH & CLUTE,
Attorneys for Wallace B. Phillips,
Original Plaintiff and Plaintiff-in-Error.

522 Fifth Avenue, Borough of Manhattan, New York City, New York.

128 *Bond.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff-in-Error, Plaintiff,

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error, Defendant.

Know all men by these presents:

That we, Wallace B. Phillips as Principal, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, having an office and principal place of business for the State of New York at No. 120 Broadway, in the Borough of Manhattan, in the City of New York, as Surety, are held and firmly bound unto United States Grain Corporation, in the full and just sum of Two Hundred and Fifty ($250) Dollars, to be paid to the said United States Grain Corporation, its successors or assigns,
129 for which payment, well and truly to be made, the said Wallace B. Phillips binds himself, his heirs, executors and administrators, and the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-third day of May, One thousand nine hundred and twenty-one.

Whereas, lately at the District Court of the United States for the Southern District of New York, in a suit pending in the said Court between Wallace B. Phillips, Plaintiff-in-Error, and United States Grain Corporation, Defendant-in-Error, a judgment was rendered on

the 21st day of December, 1920, against the said Wallace B. Phillips for the sum of Fifty-five and 57/100 Dollars and the said Wallace B. Phillips having obtained a writ of appeal and filed a copy thereof in the Clerk's Office of said Court to reverse the judgment in the aforesaid suit and a citation directed to the said United States Grain Corporation citing and admonishing it to be and appear at a session of the United States Circuit Court, Second Circuit, to be holden at the City of New York in said circuit, on the 15th day of July, 1921.

Now, Therefore, the condition of this obligation is such, that if the said Wallace B. Phillips shall prosecute said writ of appeal to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; otherwise to
130 remain in full force and virtue.

WALLACE B. PHILLIPS. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ERNEST L. HICKS,
Attorney-in-Fact.

Attest:
JAMES R. KINGSLEY,
[SEAL.] *Attorney-in-Fact.*

STATE OF NEW YORK,
County of New York, ss:

On the 23rd day of May, in the year 1921, before me personally came Ernest L. Hicks, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized
131 to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said Ernest L. Hicks further said that he is acquainted with James R. Kingsley and knew him to be the Attorney-in-Fact of said Company; that the signature of the said James R. Kingsley subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Ernest L. Hicks.

[SEAL.]
F. A. MASSEY,
Notary Public, New York County, #119.

New York Co. Reg. #3309.
My comm. expires 3/30/23.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 9th day of February, 1921 the following resolution was unanimously adopted:

132 "Resolved, That Franklin D. Roosevelt, James R. Kingsley, Hugh M. Allwood, Ernest L. Hicks, James P. Farrell, Frank A. Eickhoff, Vincent Cullen, John A. Griffin, Frances A. Massey, John W. Whitbeck, Thomas E. White, Raymond C. Laib, A. T. W. MacCormick, and Harry B. Sprague, all of the City of New York, State of New York, be and each of them is hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company.

"Such bonds or undertakings to be executed for the Company by any one of the said Franklin D. Roosevelt, James R. Kingsley, Hugh M. Allwood, Ernest L. Hicks, James P. Farrell, Frank A. Eickhoff, Vincent Cullen, John A. Griffin, Frances A. Massey, John W. Whitbeck, Thomas E. White, Raymond C. Laib, A. T. W. MacCormick, or Harry B. Sprague and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require.

"This power of attorney revokes that of January 18th, 1921, in behalf of Franklin D. Roosevelt et al."

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute
133 Book of said Company and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand the seal of the Company, at the City of New York, this 23rd day of May, 1921.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31, 1920.

Assets.

Home Office Building and Annex	$2,400,000.00
Other Real Estate	37,538.56
Bonds and Stocks, Insurance Department valuations	6,856,993.59
First Mortgage Loans, etc.	239,733.41
Unpaid Premiums, (subsequent to Oct. 1, 1920)	1,091,442.41
Unpaid Premiums, (prior to Oct. 1, 1920)	376,505.15
Bank Deposits for use of Branch Offices, etc.,	53,191.61
Cash in Banks and Trust Companies	1,778,804.84
Total Assets	12,834,209.57

134	Unpaid Premiums, (prior to Oct. 1, 1920) (Deducted according to rulings and regulations of various Insurance Departments)		376,505.15
	Total Assets (on basis of statement to Insurance Departments)		12,457,704.42

Liabilities.

	Reserve for Unearned Premiums		$3,446,816.34
	Reserve for Claims		2,161,194.38
	Reserve for Advance Premiums and Return Premiums		192,093.09
	Reserve for Commissions (Unpaid Premiums subsequent to Oct. 1, 1920)		143,604.51
	Reserve for Taxes, and Expenses in Transit.....		431,059.87
	Reserves, Special and Contingent		628,288.91
	Reserve for Unpaid Reinsurance Premiums.....		330,583.07
	Total Reserves		7,333,640.17
	Capital Stock, paid up	$3,000,000.00	
	Surplus and Undivided Profits ...	$2,500,569.40	
	Less Unpaid Premiums, (prior to Oct. 1, 1920), ... Deducted according to Insurance		
135	Department Regulations. (See above.	376,505.15	
	Surplus and Undivided Profits (on basis of statement to Insurance Departments,)	2,124,064.25	
	Surplus to Policy Holders		5,124,064.25
			12,457,704.42

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley, being duly sworn, says that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of the said Company, as of December 31, 1920, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me this 23rd day of May, 1921.
[SEAL.] F. A. MASSEY,
Notary Public, New York County, #119.

136 *Citation.*

By the Honorable Learned Hand, One of the Judges of the District Court of the United States for the Southern District of New York in the Second Circuit.

To the United States Grain Corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York in the District and Circuit above named, on the 15th day of July, 1921, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Wallace B. Phillips is plaintiff and you are defendant to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 15th day of July, in the year of our Lord One Thousand Nine
137 Hundred and twenty-one, and of the Independence of the United States the One Hundred and Forty-fifth.

L. HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

138 *Stipulation.*

United States District Court, Southern District of New York.

WALLACE B. PHILLIPS, Plaintiff-in-Error (Plaintiff below),

vs.

UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant below).

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated August —, 1921.

HATCH & CLUTE,
Attorneys for Plaintiff.
SHATTUCK, GLENN & GANTER,
Attorneys for Defendant.

139 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

WALLACE B. PHILLIPS, Plaintiff-in-Error (Plaintiff below),
vs.
UNITED STATES GRAIN CORPORATION, Defendant-in-Error (Defendant below).

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of August, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

140 United States Circuit Court of Appeals for the Second Circuit

WALLACE B. PHILLIPS, Plaintiff-in-Error,
against
UNITED STATES GRAIN CORPORATION, Defendant-in-Error.

Before Hough, Manton, and Mayer, Circuit Judges.

Writ of error to the District Court for the Southern District of New York. Action by Wallace B. Phillips, plaintiff, against the United States Grain Corporation, defendant. Judgment for defendant; plaintiff brings error. Reversed.

Hatch & Clute, Esqs., attorneys for plaintiff-in-error; Edward S. Hatch, Esq., Harold N. Whitehouse, Esq., Maurice W. Clarke, Esq., of counsel.

Shattuck, Glenn & Ganter, Esqs., attorneys for defendant-in-error; Garrard Glenn, Esq., William B. Walsh, Esq., De Witt C. Jones, Jr., Esq., of counsel.

MANTON, *Circuit Judge:*

The Plaintiff-in-error was the commanding officer of the United States ship "Laub" of the United States Navy. The defend-
141 ant-in-error is a Delaware corporation, the United States Government being its principal stockholder.

By an act of Congress approved August 10, 1917, the President wa vested with extraordinary powers in the matter of the conservation control and distribution of food products and fuel. This pronounce ment was primarily for the successful prosecution of the war, for th support and maintenance of the army, to insure an adequate supply and distribution of food stuffs and to facilitate the movements of foo and fuel; also to prevent hoarding. By an executive order, th United States Food Administrator was created. The powers con ferred upon the President by the Food and Fuel Act were by hi vested in the United States Food Administrator. The President wa authorized to purchase and sell food stuffs from time to time for cash By an executive order of August 14, 1917, it was deemed expedien and necessary to organize a corporation. The defendant-in-error wa then organized. The corporation was not delegated to utilize an department or agency of the Government nor was it directed to avai itself of any department or agency. It was authorized to act in th manner customarily followed in the trade. By its certificate of in corporation, it was provided, among other things, as follows:

"To do any and all of the things herein set forth to the same ex tent as natural persons might or could do, and

"In general, to have and to exercise all the powers conferred by th laws of Delaware upon corporations formed under the laws herein after referred to."

It was created as a trading corporation. It sought and procure all the rights and powers of corporations similarly organized
142 Nothing either in the Food and Drug Act, the executive orde or the certificate of incorporation granted to it any specia rights, privileges or exemptions. In August, 1919, the defendant in-error entered into a written agreement with the Government o Bulgaria whereby the defendant-in-error agreed to sell and deliver to the Government of Bulgaria, fourteen thousand tons of wheat flour, the value to be paid by Bulgaria in United States currency Bulgaria had no credit in the United States to pay for the wheat and the gold, which was deposited as security pursuant to the contract amounted to five million, one hundred and seventy thousand dol lars. It became the property of the defendant-in-error, and in orde to transport it to New York from Constantinople, Turkey, the de fendant-in-error requested its transportation on board the Unite States ship "Laub." Prior thereto, Admiral Knapp, the rankin United States navel officer in South European waters, cabled th Secretary of the Navy that the Relief Administration requested that the mandatory provisions of Article 1015 of the Navy Regulation be suspended as the defendant-in-error desired to ship five million gold to the United States. In answer thereto, the Secretary cable Admiral Knapp that the Department suspended the mandatory pro visions on condition that the commanding officer of the United State Navy be released from all responsibility. The Secretary of th Navy's cablegram was communi-ted to the plaintiff-in-error befor the receipt of the gold on board the "Laub." After the gold ha

been taken on board, Major Galbraith delivered to him a document purporting to be a release by the United States Food Administration, releasing the plaintiff-in-error and the United States navy
143 from all responsibility. After reading the document, the plaintiff-in-error gave to Major Galbraith a document in which he refused to accept the proffered release and a demand was thereupon made by him for the statutory freight charges fixed by the regulations for the transportation of gold. The plaintiff-in-error received from Admiral Bristol Government Order No. 46, directing him to proceed with the "Laub" to New York and authorizing him, in accordance with Article 8 of the Articles of the Government of the Navy, and Article 1510 of the Navy Regulations, to receive on board and to transport to New York the gold in question. The ship with the gold arrived in New York on October 6, 1919, where it was delivered, accepted and receipted for. Before the delivery of the gold, the plaintiff-in-error demanded the usual percentage of freight, which was one per cent of the value of the gold, but payment thereof was refused. The theory of plaintiff-in-error's case is that by virtue of Sec. 1624 of the United States Revised Statutes and Article 1510 of the Regulations of the Navy, he was authorized to receive on board, gold for freight or safekeeping, and was entitled to compensation by reason of the terms of Naval Regulation 1510. Section 1624 of the Revised Statutes forbids the receipt by a member of the Navy, of freight, goods or merchandise for sale or traffic, except gold, silver or jewels on his vessel, without authority from the President or Secretary of the Navy. Navy Regulations, Article 1510* provides
144 for authority to carry gold and the payment of a commission, among others, to the commanding officer of the ship for the safe carriage of gold, silver or jewels. The regulation does not impose any obligation to carry any gold, silver or jewels that might be tendered, but grants authority to accept such gold and when such is carried, a liability for such carriage is imposed. Article 1510 grants a wide discretion to a commanding officer of the naval vessel concerning the receipt on board of private rights of gold, silver or jewels and the contractual obligation arising from the receipt and transportation of such gold is between the shipper and the officer. (Cartas vs. United States, 250 U. S. 545.) The regulations of the navy have the force and effect of law by virtue of Sec. 1547 of the United States Revised Statutes. It is there provided that orders, regulations and instructions issued by the Secretary of the Navy, prior to July 14,

*"When gold, silver or jewels shall be placed on board of any ship for freight or safe keeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows: One-fourth to the commander in chief, one-half to the commanding officer of the ship; one-fourth to the Navy Pension Fund. To entitle the commander in chief to receive any part of the amount, he must have signified to the commanding officer of the ship, in writing his readiness to unite with him in the responsibility for the care of the treasure or other valuable. Where a commander in chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

1862, with such alterations as he may have adopted with the approval of the President, shall be recognized as regulations of the Navy, subject to the alterations adopted in the same manner as the Navy Regulations and have full force and sanction of the law. (Smith vs. Whitney, 116 U. S. 167.) The shipper placing gold on board a naval vessel for transportation, impliedly agrees to pay the compensation provided for in the navy regulations. There is no navy regulation which admits of an exception, and neither states nor suggests an instance where service may be availed of
145 without compensation. The directions contained therein are mandatory. The gold having been shipped, unless a lawful order suspending the provisions of Sec. 1510 as to compensation was made by the Secretary of the Navy, the plaintiff-in-error should have prevailed below. Section 1547 of the United States Revised Statutes provides that the Secretary of the Navy may, with the approval of the President, alter a navy regulation. But Congress did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by the law. (United States vs. Symonds, 120 U. S. 46.) In the Symonds case, it was held that Congress did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law by declaring that to be shore service which was, in fact, sea service. The authority of the Secretary is to issue orders and instructions with the approval of the President in reference to matters connected with the naval establishment is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. The Secretary may prescribe reasonable rules and regulations not inconsistent with or contrary to the laws of Congress. (Henry Gas Co. vs. United States, 191 Fed. 132.) Regulations must be confined within the limitations of such power, authority and purpose granted by
146 Congress. (Meads vs. United States, 81 Fed. 684.) In the instant case, the Secretary of the Navy attempted to suspend Article 1510 in so far as it provided compensation to be paid for services to be rendered. There is nothing in the act or regulation indicating that the right to recover compensation is dependent upon the presence or absence of an order to transport the gold. Provision for compensation is unqualified. Section 1547 of the Revised Statutes provides that naval regulations may only be altered with the approval of the President. This implies an actual, as distinguished from an implied, approval. (United States vs. Hammers, 221 U. S. 220; United States vs. Hermanos, 209 U. S. 337.)

Article 901 of the Navy Regulations (Chap. 10) provides:

"Navy Regulations—These shall include all regulations requiring the original approval of the President of the United States, and consequently the same approval of any change."

This record does not disclose that the President approved the attempted suspension by the Secretary of the Navy.

The cablegram of Admiral Knapp stated:

"Serial number Mission 555. Relief Administration desires ship about five millions gold to United States from Constantinople on board a destroyer and is willing to keep gold insured and release captain from all responsibility except such as is usually incumbent for care of public property. Under circumstances will department suspend mandatory provisions of Article 1510 Navy Regulations including percentage charge and direct that shipment be received for transportation as desired."

And the answer of the Secretary was as follows:

147 "Your mission 555 approved. Department suspends mandatory provisions Article 1510 Navy Regulations including percentage charges upon Commanding Officer with release for himself and the United States Government from all responsibility as per your Mission 555. Papers must be certified and signed by proper officials."

The plaintiff-in-error when handed the document by Major Galbraith whereby he released the plaintiff-in-error and the United States Government from all responsibility covering the shipment of gold, and reciting that the mandatory provision of Article 1510, Navy Regulations, was suspended, stated in writing:

"1. You are hereby informed that I cannot accept your release, (reference *a*), from responsibility covering shipment of approximately five million dollars ($5,000,000) gold to the United States on this vessel.

"2. The gold was received from the Commanding Officer, U. S. S. Galveston, to whom I have given receipt for same and I take full responsibility for the transportation of the gold to the United States.

"3. Copy of this letter furnished to Senior U. S. Naval Officer, Turkey."

The movement order read in accordance with Article 8 of the Articles for the Government of the Navy of the United States (Sec. 1624, Revised Statutes, Art. 1510, U. S. Navy Regulations 1913) "you are authorized to receive on board the vessel under your command." We do not think that the plaintiff-in-error having read the document handed him by Major Galbraith and having announced "I cannot accept your release" and "I take full responsibility for the transportation of the gold to the United States," waived any of his rights under the statutes or naval regulations. What he said and did indicated no intention to relinquish his rights in the premises, nor was the defendant-in-error led to believe that the plaintiff-in-error had abandoned his rights in the premises. It is
148 only where the party is deceived in the belief that the assertion of right to compensation is abandoned, that it can be successfully urged there had been a waiver. (Rice vs. Fidelity & Deposit Co., 103 Fed. 427).

The defendant-in-error is not a governmental agency, although the United States was the principal stockholder. The Government created this agency, but the corporate responsibility is that of a private corporation. (Panama Ry. Co. vs. Curran, 256 Fed. 768).

We think there was no lawful suspension of the obligation to pay which is imposed upon the defendant-in-error pursuant to Article 1510 of the Naval Regulations and that the plaintiff-in-error having transported the gold as the commanding officer of the ship "Laub" is entitled to recover pursuant to the statute and the Naval Regulations.

Judgment reversed.

149 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Wallace B. Phillips against U. S. Grain Corporation. (Copy.) Opinion. Filed Jan. 18, 1922.

150 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 15th Day of February, One Thousand Nine Hundred and Twenty-two.

Present:

Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

WALLACE B. PHILLIPS, Plaintiff-in-Error,

v.

UNITED STATES GRAIN CORPORATION, Defendant-in-Error.

A motion having been made herein by counsel for the Defendant-in-Error to amend the order for mandate filed and entered herein on the 25th day of January, 1922;

Upon consideration thereof it is

Ordered that said order for mandate be and hereby is amended to read as follows:

"Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed with costs, and cause remanded with directions that final judgment be entered by said District Court for the total amount claimed in the complaint herein as amended upon the trial below, together with interest and costs.

It is further ordered that a mendate issue to the said District Court in accordance with this decree."

H. W. R.
M. T. M.

151 [Endorsed:] United States Circuit Court of Appeals Second Circuit. W. B. Phillips v. U. S. Grain Corporation. Order. United States Circuit Court of Appeals Second Circuit Filed Feb. 15, 1922. William Parkin, Clerk.

152 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES GRAIN CORPORATION, Plaintiff-in-Error (Defendant Below),

against

WALLACE B. PHILLIPS, Defendant-in-Error (Plaintiff Below).

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of United States Grain Corporation, plaintiff-in-error in the above entitled cause and defendant below, respectfully shows.

1. That on March 19, 1920, the plaintiff served on the defendant his summons and complaint in the United States District Court for the Southern District of New York, asking for $51,700 which he claimed represented compensation due him under Article 1510 of the Navy Regulations for the transportation on a United States war vessel of gold belonging to the defendant, and stating that the plaintiff was a Lieutenant-Commander in the Navy and was in command of that vessel on the voyage in question.

2. Thereafter and on May 3, 1920, the defendant served its answer upon the attorneys for the plaintiff, and on November 13, 1920 the cause came on to be heard before the Honorable Learned Hand, District Judge, at a Law Term of the said District Court. The case was tried by consent with a jury of one. Evidence was taken in open court before said Judge and a jury of one. The cause was argued by counsel, and each side moved for the direction
153 of a verdict. On December 13, 1920, the said District Judge filed his opinion, wherein he decided that a verdict be directed in favor of the defendant and against the plaintiff; and on December 16, 1920, said District Judge denied plaintiff's motion for a verdict and granted the defendant's motion. Said District Judge directed the Clerk of the Court to direct the jury to render a verdict for the defendant. The plaintiff thereupon moved for a new trial, which was denied; and on December 21, 1920, judgment was entered in favor of the defendant and against the plaintiff for $55.57.

3. On or about June 17, 1920, the plaintiff appealed from the said judgment to this Court, and thereafter said appeal was argued in this Court. On or about January 18, 1922, this Court filed its opinion, wherein it decided that the said judgment of the said United States District Court should be reversed. On January 25, 1922, an order to show cause was signed by a Judge of this Court why an order and mandate of this Court on its said opinion filed January 18, 1922, should not direct that final judgment be entered in the said District Court instead of directing a new trial. On the return day of this order your petitioner herein and defendant below moved this Court for such an order; and on February 7, 1922, this Court granted this motion, and made its order and issued its mandate accordingly, directing that the judgment of the said District Court be reversed and that final judgment be entered by said District Court in favor of the plaintiff and against the defendant for the total amount claimed in the complaint herein as amended upon the trial below, together with interests and costs, instead of directing a new trial.

Your petitioner respectfully alleges that the said mandate of this Court, reversing the said judgment of the District Court of
154 the United States for the Southern District of New York and directing the said District Court to enter final judgment in favor of the plaintiff, is erroneous, and your petitioner feels aggrieved thereby and is desirous of obtaining a review of the Supreme Court of the United States of the said mandate upon errors assigned in the assignment of errors filed herein.

Your petitioner is advised by counsel that there are grave doubts that the judgment and mandate of this Court are valid, and your petitioner is advised that grave errors at law have been committed by this Court.

Wherefore your petitioner prays that an order directing the issuance of a writ of error to the Supreme Court of the United States and suspending all proceedings to enforce the judgment of the said District Court upon the filing of an undertaking, as provided by said order, may issue in this behalf, and that a citation for the review of the said judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit by said Supreme Court may issue and that a transcript of the proceedings and papers upon which said mandate and judgment were made, duly authenticated, be sent to the Supreme Court of the United States at Washington for its determination as to matters involved under said writ of errors; and your petitioner as in duty bound will ever pray, etc.

Dated, February 17th 1922.

UNITED STATES GRAIN CORPORATION,
By EDWIN P. SHATTUCK,
President,
Petitioner.

GARRARD GLENN,
Of Counsel.

155 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Edwin P. Shattuck, being duly sworn, deposes and says that he is the President of United States Grain Corporation, the plaintiff-in error in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

EDWIN P. SHATTUCK.

Subscribed and sworn to before me this 17th day of February, 1922.

FRANK C. BOWERS,
Notary Public, N. Y. County, N. Y., No. 668.

My term expires March 30, 1922.

156 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. United States Grain Corporation, Plaintiff-in-Error, (Defendant Below) against Wallace B. Phillips, Defendant-in-Error, (Plaintiff Below). Petition for Writ of Error. Shattuck, Glenn & Ganter, Attorneys for Plaintiff-in-Error, 42 Broadway, Borough of Manhattan, New York City.

157 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 20th day of February, One Thousand Nine Hundred and Twenty-two.

Present:

Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

WALLACE B. PHILLIPS, Plaintiff-in-Error,

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error.

Order Allowing Writ.

On reading and filing the foregoing petition for a writ of error, and on motion of Shattuck, Glenn & Ganter, attorneys for the defendant, it is hereby

Ordered that a writ of error be and it hereby is allowed to have reviewed by the Supreme Court of the United States the judgment and mandate of the Circuit Court of Appeals for the Second Circuit, lawfully entered on the 15th day of February 1922, and that the amount of bond on said writ be and it hereby is fixed at Sixty thousand ($60,000) dollars, and upon filing said bond it is further

Ordered that any further proceedings on the part of the plaintiff upon enforcement of said judgment be suspended and stayed until the final determination of the Supreme Court of the United States upon the writ of error herein granted.

February 20, 1922.

HENRY WADE ROGERS,
U. S. Circuit Judge.

158 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Wallace B. Phillips, Plaintiff-in-Error, against United States Grain Corporation, Defendant-in-Error. Order Allowing Writ. Shattuck, Glenn & Ganter, Attorneys for Defendant-in-Error, 42 Broadway, Borough of Manhattan, New York City.

159 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES GRAIN CORPORATION, Plaintiff-in-Error (Defendant Below),

against

WALLACE B. PHILLIPS, Defendant-in-Error (Plaintiff Below).

Assignment of Errors.

Now comes United States Grain Corporation, plaintiff-in-error herein, by Shattuck, Glenn & Ganter, its attorneys, in connection with its petition for a writ of error to the Supreme Court of the United States to review a judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit, entered on the 15th day of February 1922, and says that in the record of the proceedings in said Circuit Court of Appeals there is manifest error, and it makes and files the following assignment of errors:

1. That said Court erred in deciding that nothing in the Food & Fuel Act of August 10, 1917, the executive orders or the certificate of incorporation of the plaintiff-in-error granted to it any special rights privileges or exemptions.

2. That said Court erred in deciding that a liability to pay for the carriage of gold was imposed upon the plaintiff-in-error by Article 1510 of the Naval regulations.

3. That said Court erred in deciding that the regulations
160 of the Navy have the force and effect of law by virtue of Article 1547 of the United States Revised Statutes, so that the same are binding on the plaintiff-in-error.

4. That said Court erred in deciding that a shipper placing gold on board a Naval vessel for transportation impliedly agrees to pay the compensation provided in the Naval regulations.

5. That said Court erred in deciding that the directions contained in the Naval regulations with regard to compensation for transportation of gold were mandatory, so far as the plaintiff-in-error was concerned.

6. That the said Court erred in deciding that, the gold having been shipped, unless a lawful order suspending the purpose of Article 1510 of the Naval regulations as to compensation was made by the Secretary of the Navy, the defendant-in-error should have prevailed in the District Court.

7. That said Court erred in deciding that a suspension of Article 1510 of the Naval regulations by the Secretary of the Navy constituted a diminishing of an officer's compensation as established by the law.

8. That said Court erred in deciding that there is nothing in the statutes or Naval regulations indicating that the right to recover compensation is dependent upon the presence or absence of an order to transport the gold.

9. That said Court erred in deciding that an alteration of the Naval regulations must be made with the actual, as distinguished from the implied, approval of the President of the United States.

10. That said Court erred in deciding that when the defendant-in-error received the gold in question on board his vessel and read
161 the release handed to him by the plaintiff-in-error's agent, and announced that he could not accept the release and that he took full responsibility for the transportation of the gold to the United States, he did not waive any of his rights under the statutes or Naval regulations.

11. That said Court erred in deciding that the plaintiff-in-error was not led to believe that the defendant-in-error had abandoned his rights in the premises.

12. That said Court erred in deciding that there was no lawful suspension of Article 1510 of the Naval regulations in the present case.

13. That said Court erred in deciding that the defendant-in-error, having transported the gold as commanding officer of the ship "Laub," was entitled to recover, pursuant to the statute and the Naval regulations.

14. That said Court erred in failing to decide that the plaintiff-in-error was not entitled to the co-operation, support and assistance of all departments and agencies of the Government, including the transportation of the gold in question by the Navy without payment therefor.

15. That said Court erred in failing to decide that the suspensio of Article 1510 of the Naval regulations by the Secretary of the Nav must be presumed to have been made with the approval of the Pres dent of the United States.

16. That said Court erred in failing to decide that a lawful orde suspending the provisions of Article 1510 of the Naval regulation made by the Secretary of the Navy, was not necessary in order t release the plaintiff-in-error from all obligations to pay for the tran portation of the gold.

17. That said Court erred in failing to decide that the na
162 ture of the plaintiff-in-error was such that the statutes an Naval regulations with regard to compensation for the tran portation of gold were not intended to and did not apply to it.

18. That said Court erred in failing to decide that any obligatio on the plaintiff-in-error to pay for the transportation of the gold depended on the existence of a contract to that effect between th plaintiff and defendant.

19. That said Court erred in failing to decide that no contract express or implied, existed between the plaintiff-in-error and th defendant-in-error for the transportation of the gold and for com pensation for such transportation.

20. That said Court erred in failing to decide that the defendant in-error was ordered to transport the gold, and therefore could mak no contract to do that which he was already under an obligation to do

21. That said Court erred in failing to decide that the Secretary of the Navy had the power and authority to order the defendant-in- error to transport the gold for the plaintiff-in-error without charging therefor.

22. That said Court erred in failing to decide that the Secretary o the Navy, through official channels, did order the defendant to trans- port the gold without receiving compensation therefor.

23. That said Court erred in failing to decide that all regulations and conditions contained in the Secretary of the Navy's order that the gold be transported and that Section 1510 of the Naval regula tions be suspended, were complied with by the plaintiff-in-error.

24. That said Court erred in failing to decide that the defendant- in-error knew at the time he received the gold on board that
163 the plaintiff-in-error would not pay him compensation for it transportation.

25. That said Court erred in failing to decide that the defendant in-error, knowing that the plaintiff-in-error did not intend to pay him for the transportation of the gold, should have refused the same on board his vessel, in order to be consistent with his present attitud and contention.

26. That said Court erred in failing to decide that the effect of Section 1547 of the United States Revised Statutes and of Section 1510 of the Naval regulations is merely to authorize a Naval officer to make a contract for the payment of compensation for the transportation of gold, silverware or jewels, if he so desires.

27. That said Court erred in failing to decide that, in order that a contract may exist for the payment of compensation for the transportation of gold on board a Naval vessel, the Naval officer receiving the gold for such transportation must have discretion as to whether or not he will receive it on board.

28. That said Court erred in failing to decide that the defendant-in-error was legally bound by the orders of his superior officers to receive the gold in question on board his vessel and transport it to New York whether he received payment therefor or not and had no discretion in the matter.

29. That said Court erred in failing to decide that the defendant-in-error, at the time he received the gold on board his vessel, knew that he was under a legal obligation to carry the same, and that he was not intended by his superior officer to receive any compensation for transporting it.

164 30. That said Court erred in failing to decide that at the time the gold in question was placed on board the "Laub", both plaintiff-in-error and defendant-in-error believed that defendant-in-error was under legal obligation to carry the gold and not receive compensation therefor, and therefore that there was no meeting of the minds of the parties so as to create a contract for the payment of compensation for transportation.

31. That said Court erred in failing to find that in order for the defendant-in-error to recover, he must base his action on a contract, express or implied in fact, and that no such contract existed.

By reason whereof your petitioner prays that the said mandate of the United States Circuit Court of Appeals for the Second Circuit be reversed, and that the judgment of the District Court of the United States for the Southern District of New York, made and entered on the 21st day of December 1920, be affirmed and restored with full force and effect, and that the proceedings be remanded to the United States District Court for the Southern District of New York, with a direction that said Court shall restore said judgment and that further judgment for the costs of the appeals, both in the Circuit Court of Appeals for the Second Circuit and in the Supreme Court of the United States, be entered therein.

UNITED STATES GRAIN CORPORATION,
By EDWIN P. SHATTUCK, *President*,
Plaintiff-in-Error (*Defendant Below*).

165 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. United States Grain Corporation, Plaintiff-

in-Error (Plaintiff Below) against Wallace B. Phillips, Defendant-in Error (Defendant Below). Assignment of Errors. Shattuck, Glenn & Ganter, Attorneys for Plaintiff-in-Error, 42 Broadway, Borough of Manhattan, New York City.

166 *Execution Report* #6087.

Know all men by these presents, that we, the United States Grain Corporation, as principal, and the Globe Indemnity Company, as surety, are held and firmly bound unto Wallace B. Phillips, plaintiff below, in the full and just sum of Sixty Thousand and 00/100 ($60,000.00) Dollars, to be paid to the said Wallace B. Phillips, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, administrators and assigns firmly by these presents.

Sealed with our seals and dated this 16th day of February, 1922.

Whereas at a term of the United States Circuit Court of Appeals for the Second Circuit in a suit pending in said Court between Wallace B. Phillips, plaintiff in error, defendant in error herein and United States Grain Corporation, defendant in error, plaintiff in error herein, a judgment was rendered by said Circuit Court of Appeals and a mandate was issued to the United States District Court for the Southern District of New York, requiring said District Court to enter judgment against the United States Grain Corporation, defendant below and plaintiff in error herein; and the said United States Grain Corporation, defendant below and plaintiff in error herein, having obtained a writ of error to the United States Circuit — of Appeals for the Second Circuit and filed a copy thereof in the Clerk's Office of said Court to have reviewed by the Supreme Court of the United States the said judgment in the said Circuit Court of Appeals, and a citation directed to the said Wallace B. Phillips as aforesaid, citing and admonishing him to be and appear in the Supreme Court of the United States at Washington, in the District of Columbia, within thirty (30) days thereof.

Now the condition of the above obligation is such that if the said United States Grain Corporation shall prosecute this writ of error to effect and answer all damages and costs, if it fail to make this plea good, then the above obligation to be void, else to remain in full force and virtue.

UNITED STATES GRAIN CORPORATION,
By EDWIN P. SHATTUCK,
President.

Attest:
[SEAL.] G. ROY HALL, *Secretary.*

GLOBE INDEMNITY COMPANY,
By FRED C. WILLIAMS,
Resident Vice President.

Attest:
[SEAL.] W. McR. FORD,
Resident Assistant Secretary.

Sealed and delivered in the presence of
FRANK C. BOWERS.

166½ STATE OF NEW YORK,
County of New York, ss:

On February 17th, 1922, before me personally appeared Edwin P. Shattuck, to me known, who being by me duly sworn, did depose and say, that he resides in the City of New York that he is the President of United States Grain Corporation the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

FRANK C. BOWERS,
Notary Public, N. Y. County, N. Y., No. 668.

My term expires March 30, 1922.

167 STATE OF NEW YORK,
County of New York, ss:

On this 16 day of February, 1922, before me personally appeared Fred C. Williams with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the Borough of Chatham, N. J.; that he is res. vice pres. of the Globe Indemnity Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as res. vice pres. by like authority; and the said Fred C. Williams further says that he is acquainted with W. McR. Ford and knows him to be the res. asst. sec'y of said Company; that the signature of the said W. McR. Ford subscribed to said instrument, is in the genuine handwriting of said W. McR. Ford and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Fred C. Williams, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York as amended by Chapter 182 of the Laws of the State of New York for the year 1913, issued to the Globe Indemnity Company his certificate, that said Company is qualified to become and be accepted as surety or guarantor on all bonds, undertakings and other obligations or guarantees, as provided in the Insurance Law of the State of New York and all laws amendatory thereof and supplementary thereto; and that such certificate has not been revoked.

[SEAL.]

MILTON S. POWELL,
Notary Public.

Copy of By-Law.

Be it remembered, that at a regular meeting of the Board of Directors of the Globe Indemnity Company, duly called and held at the office of the Company, in the Borough of Manhattan, New York City, on the 15th day of January, 1919, a quorum being present, the following By-Law was duly adopted:

"Article 12. Execution of Bonds and Undertakings.—All bonds "and undertakings, recognizances, contracts of indemnity and all "other writings obligatory in the nature thereof, shall be signed by "the President, any Vice-President, a resident Vice-President or At-"torney-in-Fact, and unless signed by an Attorney-in-Fact shall have "the seal of the Company affixed thereto, duly attested by the Secre-"tary, an Assistant Secretary or a resident Assistant Secretary. The "President, all Vice-Presidents, and all resident Vice-Presidents shall "each have authority to sign such instruments, the Vice-President and "resident Vice-Presidents whether the President be absent or in-"capacitated or not; and the Secretary, all Assistant Secretaries and "all resident Assistant Secretaries shall each have authority to seal "and attest such instruments, the Assistant Secretaries and resident "Assistant Secretaries whether the Secretary be absent or incapaci-"tated or not. All Attorneys-in-Fact shall each have authority, in "their discretion, to affix to such instruments an impression of the "Company's seal, whether the Secretary be absent or incapacitated or "not, or to attach the individual seal of the Attorney-in-Fact thereon, "or to use the scroll of the Attorney-in-Fact, or a wafer, wax or other "similar adhesive substance affixed thereon, or a seal of paper or other "similar substance affixed thereon by mucilage or other adhesive sub-"stance, or to use the word 'Seal' or the letters 'L. S.' opposite the "signature of such Attorney-in-fact, as the case may be."

STATE OF NEW YORK,
County of New York, ss:

I, W. McR. Ford, Resident Assistant Secretary, of the Globe Indemnity Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a correct and true transcript therefrom and of the whole of Article 12 of said original By-Law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Company, this 16 day of February, 1922.

W. McR. FORD,
Resident Assistant Secretary.

Globe Indemnity Company.

Statement of December 31, 1921.

Resources.

Real Estate and Mortgages	$1,619,218.21
Railroad and Miscellaneous Bonds	3,882,780.00
Railroad Stocks	535,570.00
State and Municipal Bonds	6,242,981.50
Cash in Office and Banks	625,971.06
Premiums in Course of Collection	1,887,296.03
Interest Due and Accrued	120,709.62
Ledger Balances Secured	216,783.06
	$15,131,309.48

Liabilities.

Capital Stock	$750,000.00
Reserve for Losses	5,800,246.77
Reserve for Premiums	5,352,585.80
Reserve for Taxes and Sundry Accounts	450,000.00
Reserve for Commissions	445,421.58
Reserve for Company's Share in Workmen's Compensation Re-Insurance Bureau	22,953.22
Return Premiums	45,958.70
Surplus	2,264,143.41
	$15,131,309.48

STATE OF NEW YORK,
County of New York, ss:

I, W. McR. Ford, Resident Assistant Secretary, of the Globe Indemnity Company, do hereby certify that the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1921, and the financial condition of said Company is as favorable now as it was when said statement was made.

W. McR. FORD,
Resident Assistant Secretary.

Subscribed and sworn to before me this 16 day of February, 1922.

MILTON S. POWELL,
Notary Public, Queens County.

Certificates filed in Kings and New York Counties.
Commission expires March 30, 1924.
Queens County Clerk's No. —.
Kings County Clerk's No. —.
Kings County Register's No. 2071.
New York County Clerk's No. 125.
New York County Register's No. 3126.

168 [Endorsed:] Supreme Court of the United States. United States Grain Corporation, Plaintiff in error, against Wallace B. Phillips, Defendant in error. Surety: Globe Indemnity Company. The within Bond is hereby approved as to Form and sufficiency of the Surety this 20th day of Feb. 1922. Henry Wade Rogers, U. S. Circuit Judge.

No objection is made to the form or sufficiency of the within bond.

HATCH & CLUTE,
Attys. for Def.-in-error.

169 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 168 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Wallace B. Phillips against United States Grain Corporation, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of February in the year of our Lord One Thousand Nine Hundred and twenty-two and of the Independence of the said United States the One Hundred and forty-sixth.

[Seal of the United States Circuit Court of Apepals, Second Circuit.]

WM. PARKIN,
Clerk.

170 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES GRAIN CORPORATION, Plaintiff-in-Error (Defendant Below),

against

WALLACE B. PHILLIPS, Defendant-in-Error (Plaintiff Below).

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Wallace B. Phillips, Greeting:

You are hereby cited and admonished to appear before the Supreme Court of the United States to be held in Washington, District of Columbia, on the 20th day of March, 1922, pursuant to a writ of error to review the judgment and mandate of the United States Circuit Court of Appeals, for the Second Circuit, made on the 15th day of February 1922, reversing the judgment of the United States Dis-

trict Court for the Southern District of New York, made on the 21st day of December 1920, in favor of United States Grain Corporation, defendant below, and directing said District Court to enter judgment in favor of Wallace B. Phillips, plaintiff below, upon which writ of error the said United States Grain Corporation is the plaintiff-in-error and you are the defendant-in-error, then and there to show cause, if any there be, why the said judgment and mandate of the United States Circuit Court of Appeals should not be reversed and corrected and why speedy justice should not be done in that behalf.

171 Given under my hand and the seal of said Court, in the City of New York, in the Southern District of New York, this 20th day of February in the year of our Lord one thousand nine hundred twenty-two, and of the independence of the United States one hundred and forty-sixty.

HENRY WADE ROGERS,
One of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

172 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. United States Grain Corporation, Plaintiff-in-Error (Defendant Below), against Wallace B. Phillips, Defendant-in-Error (Plaintiff Below. Citation, Orig. Shattuck, Glenn & Ganter, Attorneys for Plaintiff-in-Error, 42 Broadway, Borough of Manhattan, New York City. Service of a copy of the within Citation is hereby admitted Feb. 20th, 1922. Hatch & Clute, Attorneys for Defendant-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1922. William Parkin, Clerk.

Endorsed on cover: File No. 28,745. U. S. Circuit Court Appeals, 2d Circuit. Term No. 290. United States Grain Corporation, plaintiff in error, vs. Wallace B. Phillips. Filed March 2d, 1922. File No. 28,745.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that pages one to four inclusive, hereto annexed, constitute a supplement to the transcript of record on writ of error to the Supreme Court of the United States in the case entitled Wallace B. Phillips, Plaintiff in Error, v. United States Grain Corporation, Defendant in Error, as the same remains of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the City of New York in the Southern District of New York, in the Second Circuit, this 4th day of January 1923, and of the Independence of the United States the one hundred and forty seventh.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

U. S. Circuit Court of Appeals for the Second Circuit.

WALLACE B. PHILLIPS, Plaintiff-in-Error,

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error.

On reading and filing the annexed affidavit of Garrard Glenn, duly verified January 25, 1922, and on the record in the above entitled action, and on the opinion of this Court made and filed herein, on or about January 19, 1922, and upon motion of Shattuck, Glenn & Ganter, attorneys for the defendant-in-error, it is

Ordered that the plaintiff-in-error herein show cause, at a term of this Court to be held at the Post Office Building, Borough of Manhattan, City of New York, on the 6th day of February, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard, why the order of this Court on said opinion, and its mandate, directed to the District Court of the United States for the Southern District of New York, to be issued in accordance with said opinion and order, should not direct that final judgment be entered by said District Court for the total amount claimed in the complaint herein as amended upon the trial below, together with interest and costs, instead of directing a new trial; and it is

Further ordered that pending the determination of this motion the issuance of the mandate of this Court to the said District Court be and the same is hereby stayed.

MANTON,
Judge of the Circuit Court of Appeals for the Second Circuit.

U. S. Circuit Court of Appeals for the Second Circuit.

WALLACE B. PHILLIPS, Plaintiff-in-Error,

against

UNITED STATES GRAIN CORPORATION, Defendant-in-Error.

STATE OF NEW YORK,
County of New York, ss:

Garrard Glenn, being duly sworn, deposes and says: I am an attorney and counsellor at law, and a member of the firm of Shattuck, Glenn & Ganter, attorneys for the defendant-in-error herein. This cause came here on a writ of error to review a judgment entered in favor of the defendant (below) on a directed verdict, each side having made such a motion. This Court has rendered an opinion whereby said judgment is reversed, and I understand that its order and mandate pursuant thereto will direct a new trial of the issues.

The questions involved on this record are exclusively of law, and I desire, in behalf of the defendant, to secure a review of this Court's decision by the United States Supreme Court; a writ of error lying in that behalf in view of the nature of the suit and the questions it involves. The defendant-in-error does not, by making this motion, consent to a judgment against it, but asks only that if there be such a judgment, it should be final in form, instead of interlocutory, so that it might appeal to the Supreme Court of the United States therefrom.

I therefore respectfully ask for an order to show cause substantially in the form hereto annexed, for which no previous application has been made.

GARRARD GLENN.

Subscribed and sworn to before me this 25th day of January, 1922.
[SEAL.] FRANK W. DEMUTH,
Notary Public, Bronx Co., N. Y., No. 44.

Ctf. Filed in New York Co. No. 401.
My Commission expires March 30, 1923.

[Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Wallace B. Phillips, Plaintiff-in-Error, against United States Grain Corporation, Defendant-in-Error. Affidavit and order. Shattuck, Glenn & Ganter, Attorneys for Defendant-in-error, 42 Broadway, Borough of Manhattan, New York City.

[Endorsed:] 290/28745. United States Circuit Court of Appeals, Second Circuit. Wallace B. Phillips v. U. S. Grain Corporation. Supplement to Transcript of Record. 2.20.

In the Supreme Court of the United States, October Term, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION, Plaintiff-in-Error,

against

WALLACE B. PHILLIPS, Defendant-in-Error.

It is stipulated that there may be printed, as a supplement to the transcript of record herein, a certified transcript of the affidavit and notice of motion to amend the mandate of the U. S. Circuit Court of Appeals for the Second Circuit, filed in said court by the then defendant-in-error (plaintiff-in-error here) after the rendition of said court's opinion in this cause.

Dated: January 11, 1923.

GARRARD GLENN,
Counsel for Plaintiff-in-Error.
HAROLD N. WHITEHOUSE,
Counsel for Defendant-in-Error.

[Endorsed:] 290/28,745.

[Endorsed:] File No. 28,745. Supreme Court U. S., October Term, 1922. Term No. 290. United States Grain Corporation, P. E., vs. Wallace B. Phillips. Stipulation and addition to record. Filed Jan. 17, 1923.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

against

WALLACE B. PHILLIPS,
Defendant-in-Error.

NOTICE OF MOTION AND PETITION.

GARRARD GLENN,
WILLIAM B. WALSH,
DeWITT C. JONES, Jr.,
Counsel for Petitioner,
Plaintiff-in-Error,
42 Broadway,
Borough of Manhattan,
New York, N. Y.

The Evening Post Job Printing Office, Inc., 20 Vesey St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

AGAINST

WALLACE B. PHILLIPS,
Defendant-in-Error.

SIRS:

PLEASE TAKE NOTICE that on the 3d day of October, 1922, at the opening of the Court, or as soon thereafter as said matter can be heard, the annexed petition and motion, of which a true copy is herewith served upon you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Dated, New York, September 11, 1922.

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for Petitioner,
Plaintiff-in-Error,
42 Broadway,
Borough of Manhattan,
New York, N. Y.

To:

HAROLD N. WHITEHOUSE, Esq.,
Counsel for Defendant-in-Error,
522 Fifth Avenue,
New York, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

AGAINST

WALLACE B. PHILLIPS,
Defendant-in-Error.

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the United States Grain Corporation respectfully shows and alleges:

FIRST: Your petitioner is a corporation organized and existing under the laws of the State of Delaware, with its principal office in the City of New York, New York.

SECOND: This action was commenced in the United States District Court for the Southern District of New York, at law, by Wallace B. Phillips (defendant-in-error herein) as plaintiff, against your petitioner as defendant. The issues were tried on November 13, 1920, before Hon. Learned Hand, *D. J.*, and a jury of one. Both sides moved at the conclusion of the case for the direction of a verdict. Judge Hand later directed a verdict for the defendant, your petitioner herein, and judgment for the defendant was entered accordingly on December 21, 1920. A true copy of the opinion rendered by Judge

Hand is hereto annexed as Exhibit A and made a part hereof.

THIRD: The plaintiff below (defendant-in-error herein), appealed from said judgment, by way of writ of error, to the Circuit Court of Appeals for the Second Circuit. The appeal was argued; and on January 19, 1922, said Circuit Court of Appeals reversed the decision of the District Court. A copy of the opinion of said Circuit Court of Appeals is annexed to this petition as Exhibit B and made a part hereof.

FOURTH: The mandate to be entered on the opinion of said Circuit Court of Appeals would, in ordinary course, have directed a new trial; but, the facts not being in dispute and your petitioner desiring an early review of the case by this Court, your petitioner moved, under the authority of *Thomsen* v. *Cayser* (243 U. S. 66, 37 Sup. Ct. 353), that the mandate of said Circuit Court of Appeals should direct the entry of final judgment for the plaintiff below (defendant-in-error herein) instead of directing a new trial of the cause. This motion was granted, and the mandate issued accordingly.

FIFTH: On February 20, 1922, writ of error out of this court was duly granted. Said writ and citation thereon were duly served and filed with the Clerk of said Circuit Court of Appeals.

SIXTH: On or about February 28, 1922, a certified copy of the record herein was duly filed with the Clerk of this Court; and on or about March 10, 1922, said cause was docketed in this Court as No. 290 for October Term, 1922; and said cause is now pending and awaiting hearing in this Court.

Said record has been printed, and printed copies are on file in this Court.

The case which this record presents and its issues are as follows:

SEVENTH: The plaintiff below (defendant-in-error here) seeks to recover approximately the sum of $51,000 from your petitioner (plaintiff-in-error here); said sum being claimed as a commission due said plaintiff for the transportation in September and October, 1919, of a certain quantity of gold, amounting to approximately $5,100,000, belonging to the defendant. The plaintiff claims this by virtue of two Federal statutes and a Navy Regulation which are mentioned in the complaint (Rec. pp. 4-5). The statutes provide (*a*) that the regulations issued by the Secretary of the Navy, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner, and (*b*) that any officer who takes on board his vessel, for freight or safekeeping any merchandise except gold, silver or jewels, shall be guilty of a military offense triable by a naval court martial. The Navy Regulation provides that when gold is placed on board ship for freight or safe keeping, as provided by the statute above mentioned, the commander shall sign bills of lading for the amount and be responsible therefor, and that "the usual percentage shall be demanded of the shippers". The plaintiff is a United States Naval officer, and in the summer of 1919 was in command of the U. S. S. S. "Laub", a destroyer of the United States Navy, then stationed in Turkish waters. Your petitioner is a corporation organized during the summer of 1917, pursuant to an

Executive Order issued by the President of the United States, acting under authority of the Act of Congress of August 10, 1917, known as the "Food Control Act" or the "Lever Act" (40 Stat. 276). It was incorporated under the Business Corporations Law of the State of Delaware, and all of its capital stock has been at all times, and now is, owned by the United States of America. The purpose for which your petitioner was organized was to act as an agency to handle grain during the period of the war, under the direction and supervision of the United States Food Administration and of the United States Food Administrator, Hon. Herbert Hoover.

EIGHTH: In the early part of 1919, subsequent to the signing of the Armistice which put an end to hostilities on November 11, 1918, under authority of an Act of Congress dated February 25, 1919, and an Executive Order of the President of the United States, dated March 1, 1919, there was organized and created the American Relief Administration, for the purpose of extending relief, particularly in the nature of foodstuffs, to the needy populations of Europe; and your petitioner was designated as an agency to assist and simplify the work of said American Relief Administration in such European countries.

NINTH: Pursuant thereto, your petitioner entered into an agreement with the Government of Bulgaria, in March, 1919, whereby your petitioner sold a large quantity of wheat and other foodstuffs to said Government of Bulgaria, and in payment therefor received gold coin from said Government aggregating upwards of $5,000,000. Said gold coin

was delivered to your petitioner, through its duly authorized representative at the port of Varna, Bulgaria; and, at various times during the spring and summer of 1919, it was transported from Varna to Constantinople for your petitioner, on various United States war vessels stationed in or about the latter port. Thereafter the gold was stored on board various United States war vessels in the harbor of Constantinople, and was finally all placed on the U. S. S. "Galveston" in said harbor for safekeeping.

TENTH: Then your petitioner, being desirous of shipping said gold to the United States, applied to the United States Navy Department for permission to ship said gold from Constantinople to the United States on board a United States war vessel, and requested the Navy Department to suspend the above mentioned Section 1547 of the United States Navy Regulations, permitting the commander of a Naval vessel on which gold is transported to charge a commission for such transportation. Said requests were complied with by the United States Navy Department, acting through Honorable Josephus Daniels, Secretary of the Navy, and the plaintiff, as commander of the U. S. S. S. "Laub", was designated by his superior officers to transport said gold for the defendant on board said vessel from Constantinople to New York. Thereafter said gold was placed on board said U. S. S. S. "Laub", and your petitioner, through its duly authorized representative, tendered to the plaintiff a release as called for in the aforesaid instructions of the Secretary of the Navy. This release was refused by the plaintiff, who demanded compensation for transporting said gold from Constantinople to New

York. This your petitioner refused. Thereupon, and on or about the 15th day of September, 1919, the plaintiff, with said quantity of gold on board, proceeded with his vessel from Constantinople to New York; and on arriving at the latter port, delivered said gold to the order of your petitioner, again demanding that he be paid for such transportation.

The questions involved in this case:—

ELEVENTH: The District Court (Learned Hand, *J.*) upheld your petitioner's contention (Rec. pp. 12-17) and the Circuit Court of Appeals reversed him (Rec. pp. 65-70). The points made by your petitioner in the arguments below, were these, in substance:—(1) Apart from the statute and regulation upon which the plaintiff relies, it is clear that the plaintiff must show an actual contract, express or implied in fact, between himself and your petitioner, binding the latter to pay freight for the transportation of gold on a vessel which the plaintiff did not own. (2) There was no express contract to that effect. (3) No contract can be implied, because the regulation had been duly suspended by the Secretary, the concurrence of the President being presumed as matter of law. But even if the Secretary had no power to suspend the regulation, still there can be no implication of a contract because (*a*) the plaintiff was under orders to carry the gold, and (*b*) all the circumstances negatived any conveyance by your petitioner of any intention to contract. (4) Neither the statute nor the regulation inherently binds your petitioner; they are disciplinary in their nature and apply only to persons who are members of the naval forces. (5) The statute and regula-

tion are permissive merely; they allow the officer to make a contract but do not create one for him. (6) Neither the statute nor the regulation was intended to give the plaintiff even permission to make a charge to a co-ordinate agency of the government like your petitioner. With these contentions, Judge Hand agreed; but the Circuit Court of Appeals reversed him on the ground that the statute and regulation bound your petitioner, and that "the shipper placing gold on board a naval vessel for transportation implied agrees to pay the compensation provided for in the navy regulations"; there being "no navy regulation which admits of an exception"; and that the regulation was not duly suspended in the present case (Rec. p. 68). Such are the points in this case. It is obvious that they present a Federal question cognizable on writ of error from this court. The plaintiff's position, which has received the approval of the Circuit Court of Appeals, is that the Statute and Naval Regulation bind all persons, and that hence the shipper "impliedly agrees to pay the compensation provided for in the navy regulations". Accordingly the plaintiff's suit rests on the statute and regulations, and so he pleads them in his complaint (Rec. pp. 4-5). The Circuit Court of Appeals says that his theory is "that by virtue of * * * the Statutes and * * * the Regulations * * * he was authorized to receive on board gold for freight or safekeeping, and was entitled to compensation," etc. (Rec. p. 67; *infra*, p.). This proposition your petitioner denies and, if its denial is sound, then the plaintiff cannot recover, for he has neither pleaded nor shown any agreement, actual or implied in fact, for compensation. Unless he can recover *ex vi* the

Statute and Regulations, he cannot recover at all, and the judgment should be reversed.

TWELFTH: *Your petitioner respectfully moves the advancement of this cause on the calendar for the following reasons:*—During the war your petitioner served the purposes of the Food Administration; in the period following the Armistice it acted, as above stated, in conjunction with the American Relief Administration; and during the current year it acted in matters of Russian relief pursuant to the Act of Congress of December 22, 1921, and the Presidential Proclamation of December 24, 1921, issued pursuant thereto. It has now substantially completed all of these undertakings. The present suit, however, requires a reserve of over $50,000. In addition, six other suits are now pending against your petitioner in the United States District Court for the Southern District of New York, involving claims of upwards of $300,000. These suits were brought by the commanders of the various war vessels which transported from Varna to Constantinople, or held on storage there, the same gold which later was transported on the plaintiff's vessel from Constantinople to New York, and furnishes the subject matter of the present case. These cases have certain points in common with the case at bar, and a determination herein would greatly facilitate the disposition of them. The United States is the sole stockholder of your petitioner, and so is entitled to all funds that may remain in its treasury after the payment of its debts. In addition should be considered, it is respectfully submitted, the matters of public policy and interest inherent in the nature of the case as above stated.

WHEREFORE your petitioner prays that this Court will be pleased to enter an order directing that this cause be advanced from its regular position on the calendar of pending causes, and be set down for hearing on an early date to be determined by this Court.

And your petitioner will ever pray, etc.

Dated, September 21, 1922.

Respectfully submitted,

UNITED STATES GRAIN CORPORATION,
By EDWARD M. FLESH,
President,
Petitioner.

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for Petitioner.

STATE OF NEW YORK,
County of New York, } ss:

EDWARD M. FLESH, being duly sworn deposes and says that he is the President of the United States Grain Corporation, petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

Edw. M. Flesh

Subscribed and sworn to
before me this 25
day of September, 1922.

Della McLaughlin.

Notary Public, Kings Co. No. 99
Ctf. Filed in New York Co. No. 37
Commission expires Mar. 30, 1923

Exhibit "A" to Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

WALLACE B. PHILLIPS

AGAINST

UNITED STATES GRAIN CORPORATION.

This is an action at law tried before a jury of one. The facts proved are as follows: The plaintiff was a Lieutenant-Commander of the United States Navy in command of U. S. S. "Laub" in September, 1919. The "Laub", a destroyer, was at the time at Constantinople and Captain Greenslade, U. S. N., was the immediate superior of the plaintiff. Superior in rank to Captain Greenslade was Rear-Admiral Bristol, and the commanding officer in the water of the Eastern Mediterranean was Rear-Admiral Knapp.

The defendant is a corporation organized under the laws of Delaware by order of the President acting through the war powers conferred upon him by the Lever Act (August 10, 1917). All its stock is owned by the United States and it was originally formed during the war as a convenience in the discharge of the duties of the Food Administrator. After the Armistice that official continued to use it for the relief of European countries under appropriations from Congress. In August, 1919, the defendant made a contract, not expressly

authorized by statute, with the Bulgarian Government for the sale of flour to be paid for either in New York funds or gold. As New York funds were not available, the payment was made in gold, which became the property of the defendant, and it is for the transportation of this that the action is brought.

Having been delivered on board U. S. S. "Galveston" at Varna the gold, some five millions in amount, was brought to Constantinople and there transferred to the "Laub" under the following circumstances. In August it became apparent that the gold might have to be transported to the United States, and the defendant wishing to secure the services of a naval vessel and to avoid the supposed effect of the Navy Regulations, Article 1510, asked Admiral Knapp to cable to the Secretary of the Navy for the proper authorization. This the Admiral did and received answer on August sixteenth that the Department suspended the Article in question if the defendant released the commanding officer and the United States from all responsibility. Article 1510 provides that "when gold, silver or jewels shall be placed on board of any ship for freight or safekeeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows." The statute referred to in Article 1510 is Article Eight of Section 1624 of the Revised Statutes, which defines court-martial offenses. Subdivision 13 of this article makes it an offense to take on board any vessel "any goods or merchandise except gold, silver or jewels for freight or safe-keeping", or to

take any compensation for transporting any merchandise but these.

On September tenth Captain Greenslade ordered the plaintiff to take the gold on board from the "Galveston", his own command, and, as soon as practicable, to carry it to New York, informing him at the same time of the Secretary's cable. The plaintiff received the gold on September fifteenth, and later that day the representative of the defendant, Major Galbraith, U. S. A., came on board and offered the plaintiff a release "from all responsibility * * * except such responsibility as is usually incumbent for the care of public property". The plaintiff by a written paper declined this release and asserted that he had received the gold from Captain Greenslade to whom he had given a receipt and that he took full responsibility for its transportation.

Also on September fifteenth, 1919, Admiral Bristol sent an order to the plaintiff directing him "as soon as practicable" to proceed to New York, and advising him that he was authorized under Article Eight of the statute and Article 1510 of the regulations to take on board the gold stored in the "Galveston". The Admiral assumed joint responsibility with the plaintiff and submitted a copy of the Secretary's cable. Admiral Bristol on August twelfth, had already informed Major Galbraith that he claimed his percentage of the commission and that the gold must be regarded as private property and subject to Article 1510.

HAROLD N. WHITEHOUSE and MAURICE W. CLARKE for the plaintiff.

GARRARD GLENN, WILLIAM B. WALSH and DEWITT C. JONES, JR., for the defendant.

LEARNED HAND, *D. J.*: The effect of the statute seems to me very clearly to be only this: It permits officers of the navy in command of ships to carry gold, silver and jewels as a private venture. Merchandise generally they may not carry since the vessels are not their own; but as a favor, these they may make a bargain to carry on such terms as they choose. In so far the United States will permit its ships to be used for the private purposes of its officers. True, the statute does not give that right affirmatively, but it is clearly enough implied and has always been so recognized. So far as *Cartas* vs. *U. S.*, 250 U. S. 545, has anything at all to do with the case at bar, it involves this conclusion. Article 1510 of the regulations affects to limit this right by requiring the officers to sign bills of lading for such goods and to be "responsible" for them; it fixes the amount of freight money, and divides it between the officer in command, his superior, and the navy pension fund. Both sides concede that in so far as this limited the absolute right of the commanding officer to charge what he could and to keep what he charged it was valid. In the face of that article his right was limited, but the article did not, and could not, impose upon him any obligation to carry any or all gold, silver or jewels that might be tendered. He remained as before legally open to accept any such as he chose, but if he did, he must regard himself as bound by the article in question. It was still a private venture in which he might engage or not, as the inducements moved him.

It is very apparent that neither the officers of the navy nor the defendant so understand the article, but supposed that it affirmatively gave the plaintiff the right to demand a commission unless it was suspended. In this they were in error, because if the plaintiff was under orders to carry the gold, he could not earn any commission whether the article was suspended or not. The statute and the article together only gave him leave to make a contract, and did not of themselves create any obligation against a third party. The only possible obligation would be a contract implied from the defendant's request, and such a contract required a consideration or it was *nudum pactum*. But, if the plaintiff was in fact under unconditional orders to carry the gold, his consent or even his promise to do so was not a valid consideration.

The case comes down, therefore, to this: Was the plaintiff ordered to carry the gold, and was that order valid? The record shows an absolute and unconditional order of Captain Greenslade on the tenth, and if the case stopped there, there could be no recovery, the article having nothing whatever to do with the case under those circumstances. Admiral Bristol's order of the fifteenth must, however, be taken as superseding that of Captain Greenslade, and though it directed the plaintiff to proceed to New York, it did not expressly order him to carry the gold. Instead, it "authorized" him to do so. This "authorization" was wholly unnecessary, because the statute gave leave to the plaintiff to carry the gold, a leave which neither the Admiral, nor any one else, could take from him. Probably the Admiral so supposed and only used the phrase because he meant to reserve his right to his own share of the commission, because he had

denied the right of the defendant to get the gold carried at all as public property.

But, whatever the Admiral meant by the order, in fact he inclosed with it the cable of the Secretary, the second copy of it which the plaintiff had received. Now that cable did profess to suspend the article, and whether or not the Secretary could lawfully do so, the plaintiff nevertheless knew the purpose of the cable which incorporated by reference Admiral Knapp's request for instructions as to the detail of a destroyer to carry the gold. He knew that the Secretary meant the gold to be carried and that too without commission. Therefore, when he got Admiral Bristol's order, he could have been under no misgivings as to what his eventual superior intended him to do. It was impossible for him to read the Secretary's cable in any other way than as meaning that the officer eventually designated to do so, should carry the gold and receive no commission. If, therefore, the Secretary had the power to give such an order he was under a duty to carry the gold, and he suffered no legal detriment by doing so. It makes no difference whatever whether the Secretary could suspend the article or not, because it applied any way only to a case in which the plaintiff might withhold his service.

The case, therefore, in its final analysis comes down to whether the Secretary had the power to direct the plaintiff to carry the defendant's gold without commission; that is, whether he might use the navy of the United States for such a purpose, or, as it may be otherwise stated, whether that was a public purpose. I shall assume, though for argument only, that the Secretary had no power to order a ship of the navy to carry the gold of a private person, and that the plaintiff might lawfully have

refused to obey such an order, though at least the last question is open to doubt. Even so, I have no doubt that the Secretary had power to order the plaintiff to carry this gold, because of the nature of the defendant's business. I agree that the defendant is a justiciable person (though see *Ballaine* v. *Alaska Ry.*, 259 Fed. R. 183), but that is quite another thing from being a person that the navy may not legally assist in its business. In substance, all its property was that of the United States, including the gold in question, even though a crime against it is not a crime against the United States *Salas* v. *U. S.*, 234 Fed. R. 842. It had been organized merely as a convenience to the execution of public purposes, as defined by Congress, and it was as much a governmental agency as the navy itself. Its form cannot disguise its true character, *U. S.* v. *Coughlin*, 261 Fed. R. 424. To assert that the navy may not lawfully lend its assistance to such a corporation is in effect to say that the United States may not use its several creatures in mutual coöperation for its general purposes. Nor does it make a difference that the contract with Bulgaria was not authorized. The flour had been the property of the defendant and even if sold without authority, the gold was also its property. It was at Constantinople, however acquired, and it was in any aspect within the lawful purpose of the defendant to get it to New York. It is of no concern to the plaintiff whether the bargain was unlawful through which it became the property of the defendant. That question is totally distinct from that of jurisdiction over the defendant. I hold, therefore, that the Secretary had the power to direct a destroyer to carry the gold, and, as already stated, that he meant to have the proper

official, who turned out to be Admiral Bristol, designate some specific one.

However, the plaintiff argues that the Secretary's order was conditional upon a release and that the defendant never gave one as required. The only objections urged are that Major Galbraith had no power to release the plaintiff, that he signed for the "Food Administration" and not for the defendant, and that the release was not complete. That Major Galbraith had full power locally is established by uncontradicted proof, and the Secretary can hardly have meant by his order more than a release by the local officers. He certainly did not expect the release to be executed in the United States or even that it should go to London. The right of Major Galbraith is questioned under the by-laws of the corporation, but they do not control between third persons. As to the form of his execution of the release, it is a defect which is a mere lawyer's afterthought. The plaintiff refused to accept the release and insisted upon "full responsibility", because he had received the gold from Captain Greenslade, and supposed that he acquired thereby an indefeasible right to his commission. Had he raised the defect of form it could at once have been corrected; by placing his refusal upon other grounds he prevented the correction of the error, if it was an error, and he waived it. As to the form of the release; it may be observed that the Secretary's order is not to be construed as requiring a release from the responsibility generally obtaining in the case of public property. The plaintiff suggested no objection of the sort at the time, and it would have been preposterous to suppose that he was to be irresponsible for any neglect however gross. Even so, as in the case of the form of execution he waived the defect by placing his refusal on other grounds.

The first defense pleaded is an adequate bar, though it may have been based upon the theory of law that the article must have been suspended. It alleged the Secretary's cable (Article 15) and its transmission to the plaintiff (Article sixteen). The cable was in fact an order though it required that Admiral Bristol should specify the proper ship, a specification not necessary to be alleged in the pleading. It further alleges that the suspension of Article 1510 was "binding" upon the plaintiff. "Binding" for what? Certainly for no other purpose than to compel him to carry the gold without commission and as a part of his general duties as a naval officer. Whatever the defendant's legal theory, it therefore alleged all the facts necessary to the defense and, in accordance with general rules, it is not committed to its theory of the law.

Verdict directed for the defendant.

December 13, 1920.

D. J.

Exhibit "B" to Petition.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

WALLACE B. PHILLIPS,
Plaintiff-in-Error,

AGAINST

UNITED STATES GRAIN CORPORATION,
Defendant-in-Error.

Before:

HOUGH, MANTON and MAYER,
Circuit Judges.

Writ of error to the District Court for the Southern District of New York. Action by Wallace B. Phillips, plaintiff, against the United States Grain Corporation, defendant. Judgment for defendant; plaintiff brings error. Reversed.

HATCH & CLUTE, Esqs.,
Attorneys for Plaintiff-in-error.
EDWARD S. HATCH, Esq.,
HAROLD N. WHITEHOUSE, Esq.,
MAURICE W. CLARKE, Esq.,
of Counsel.

SHATTUCK, GLENN & GANTER, Esqs.,
Attorneys for Defendant-in-error.
GARRARD GLENN, Esq.,
WILLIAM B. WALSH, Esq.,
DEWITT C. JONES, JR., Esq.,
of Counsel.

MANTON, *Circuit Judge.*

The plaintiff-in-error was the commanding officer of the United States ship "Laub" of the United

States Navy. The defendant-in-error is a Delaware corporation, the United States Government being its principal stockholder.

By an act of Congress approved August 10, 1917, the President was vested with extraordinary powers in the matter of the conservation, control and distribution of food products and fuel. This pronouncement was primarily for the successful prosecution of the war, for the support and maintenance of the army, to insure an adequate supply and distribution of food stuffs and to facilitate the movements of food and fuel; also to prevent hording. By an executive order, the United States Food Administrator was created. The powers conferred upon the President by the Food and Fuel Act were by him vested in the United States Food Administrator. The President was authorized to purchase and sell food stuffs from time to time for cash. By an executive order of August 14, 1917, it was deemed expedient and necessary to organize a corporation. The defendant-in-error was then organized. The corporation was not delegated to utilize any department or agency of the Government nor was it directed to avail itself of any department or agency. It was authorized to act in the manner customarily followed in the trade. By its certificate of incorporation, it was provided, among other things, as follows:

> "To do any and all of the things herein set forth to the same extent as natural persons might or could do, and
>
> "In general, to have and to exercise all the powers conferred by the laws of Delaware upon corporations formed under the laws hereinafter referred to."

It was created as a trading corporation. It sought and procured all the rights and powers of corporations similarly organized. Nothing either in the Food and Drug Act, the executive order or the

certificate of incorporation granted to it any special rights, privileges or exemptions. In August, 1919, the defendant-in-error entered into a written agreement with the Government of Bulgaria whereby the defendant-in-error agreed to sell and deliver to the Government of Bulgaria, fourteen thousand tons of wheat flour, the value to be paid by Bulgaria in United States currency. Bulgaria had no credit in the United States to pay for the wheat and the gold, which was deposited as security pursuant to the contract, amounted to five million, one hundred and seventy thousand dollars. It became the property of the defendant-in-error, and in order to transport it to New York from Constantinople, Turkey, the defendant-in-error requested its transportation on board the United States ship "Laub". Prior thereto, Admiral Knapp, the ranking United States naval officer in South European waters, cabled the Secretary of the Navy that the Relief Administration requested that the mandatory provisions of Article 1015 of the Navy Regulations be suspended as the defendant-in-error desired to ship five millions gold to the United States. In answer thereto, the Secretary cabled Admiral Knapp that the Department suspended the mandatory provisions on condition that the commanding officer of the United States Navy be released from all responsibility. The Secretary of the Navy's cablegram was communicated to the plaintiff-in-error before the receipt of the gold on board the "Laub". After the gold had been taken on board, Major Galbraith delivered to him a document purporting to be a release by the United States Food Administration, releasing the plaintiff-in-error and the United States navy from all responsibility. After reading the document, the plaintiff-in-error gave to Major Galbraith a document in which he refused to accept the proffered re-

lease and a demand was thereupon made by him for the statutory freight charges fixed by the regulations for the transportation of gold. The plaintiff-in-error received from Admiral Bristol Government Order No. 46, directing him to proceed with the "Laub" to New York and authorizing him, in accordance with Article 8 of the Articles of the Government of the Navy, and Article 1510 of the Navy Regulations, to receive on board and to transport to New York the gold in question. The ship with the gold arrived in New York on October 6, 1919, where it was delivered, accepted and receipted for. Before the delivery of the gold, the plaintiff-in-error demanded the usual percentage of freight, which was one per cent of the value of the gold, but payment thereof was refused. The theory of plaintiff-in-error's case is that by virtue of §1624 of the United States Revised Statutes and Article 1510 of the Regulations of the Navy, he was authorized to receive on board, gold for freight or safekeeping, and was entitled to compensation by reason of the terms of Naval Regulation 1510. Section 1624 of the Revised Statutes forbids the receipt by a member of the Navy, of freight, goods or merchandise for sale or traffic, except gold, silver or jewels on his vessel, without authority from the President or Secretary of the Navy. Navy Regulations, Article 1510* pro-

* "When gold, silver or jewels shall be placed on board of any ship for freight or safe keeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shipers, and its amount shall be divided as follows: One-fourth to the commander in chief, one-half to the commanding officer of the ship; one-fourth to the Navy Pension Fund. To entitle the commander in chief to receive and part of the amount, he must have signified to the commanding officer of the ship, in writing his readiness to unite with him in the responsibility for the care of the treasure or other valuable. Where a commander in chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

vides for authority to carry gold and the payment of a commission, among others, to the commanding officer of the ship for the safe carriage of gold, silver or jewels. The regulation does not impose any obligation to carry any gold, silver or jewels that might be tendered, but grants authority to accept such gold and when such is carried, a liability for such carriage is imposed. Article 1510 grants a wide discretion to a commanding officer of the naval vessel concerning the receipt on board of private rights of gold, silver or jewels and the contractual obligation arising from the receipt and transportation of such gold is between the shipper and the officer. (*Cartas* vs. *United States*, 250 U. S. 545.) The regulations of the navy have the force and effect of law by virtue of §1547 of the United States Revised Statutes. It is there provided that orders, regulations and instructions issued by the Secretary of the Navy, prior to July 14, 1862, with such alterations as he may have adopted with the approval of the President, shall be recognized as regulations of the Navy, subject to the alterations adopted in the same manner as the Navy Regulations and have full force and sanction of the law. (*Smith* vs. *Whitney*, 116 U. S. 167.) The shipper placing gold on board a naval vessel for transportation, impliedly agrees to pay the compensation provided for in the navy regulations. There is no navy regulation which admits of an exception, and neither states nor suggests an instance where service may be availed of without compensation. The directions contained therein are mandatory. The gold having been shipped, unless a lawful order suspending the provisions of §1510 as to compensation was made by the Secretary of the Navy, the plaintiff-in-error should have prevailed below. Section 1547 of the United States Revised Statutes provides that the

Secretary of the Navy may, with the approval, of the President, alter a navy regulation. But Congress did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by the law. (*United States* vs. *Symonds*, 120 U. S. 46.) In the Symonds' case, it was held that Congress did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law by declaring that to be shore service which was, in fact, sea service. The authority of the Secretary is to issue orders and instructions with the approval of the President in reference to matters connected with the naval establishment is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. The Secretary may prescribe reasonable rules and regulations not inconsistent with or contrary to the laws of Congress. (*Henry Gas Co.* vs. *United States*, 191 Fed. 132.) Regulations must be confined within the limitations of such power, authority and purpose granted by Congress. (*Meads* vs. *United States*, 81 Fed. 684.) In the instant case, the Secretary of the Navy attempted to suspend Article 1510 in so far as it provided compensation to be paid for services to be rendered. There is nothing in the act or regulation indicating that the right to recover compensation is dependent upon the presence or absence of an order to transport the gold. Provision for compensation is unqualified. Section 1547 of the Revised Statutes provides that naval regulations may only be altered with the approval of the President. This implies an actual, as distinguished from an implied, approval. (*United States* vs. *Hammers*, 221 U. S. 220; *United States* vs. *Hermanos*, 209 U. S. 337.)

Article 901 of the Navy Regulations (Chap. 10) provides:

> "Navy Regulations—These shall include all regulations requiring the original approval of the President of the United States, and consequently the same approval of any change."

This record does not disclose that the President approved the attempted suspension by the Secretary of the Navy.

The cablegram of Admiral Knapp stated:

> "Serial number Mission 555. Relief Administration desires ship about five millions gold to United States from Constantinople on board a destroyer and is willing to keep gold insured and release captain from all responsibility except such as is usually incumbent for care of public property. Under circumstances will department suspend mandatory provisions of Article 1510 Navy Regulations including percentage charge and direct that shipment be received for transportation as desired."

And the answer of the Secretary was as follows:

> "Your mission 555 approved. Department suspends mandatory provisions Article 1510 Navy Regulations including percentage charges upon Commanding Officer with release for himself and the United States Government from all responsibility as per your Mission 555. Papers must be certified and signed by proper officials."

The plaintiff-in-error when handed the document by Major Galbraith whereby he released the plaintiff-in-error and the United States Government from all responsibility covering the shipment of gold, and reciting that the mandatory provision of Article

1510, Navy Regulations, was suspended, stated in writing:

> "1. You are hereby informed that I cannot accept your release, (reference *a*), from responsibility covering shipment of approximately five million dollars ($5,000,000) gold to the United States on this vessel.
>
> "2. The gold was received from the Commanding Officer, U. S. S. Galveston, to whom I have given receipt for same and I take full responsibility for the transportation of the gold to the United States.
>
> "3. Copy of this letter furnished to Senior U. S. Naval Officer, Turkey."

The movement order read in accordance with Article 8 of the Articles for the Government of the Navy of the United States (§1624, Revised Statutes, Art. 1510, U. S. Navy Regulations 1913) "you are authorized to receive on board the vessel under your command". We do not think that the plaintiff-in-error having read the document handed him by Major Galbraith and having announced "I cannot accept your release" and "I take full responsibility for the transportation of the gold to the United States", waived any of his rights under the statutes or naval regulations. What he said and did indicated no intention to relinquish his rights in the premises, nor was the defendant-in-error led to believe that the plaintiff-in-error had abandoned his rights in the premises. It is only where the party is deceived in the belief that the assertion of right to compensation is abandoned, that it can be successfully urged there has been a waiver. (*Rice* vs. *Fidelity & Deposit Co.*, 103 Fed. 427.)

The defendant-in-error is not a governmental agency, although the United States was the principal stockholder. The Government created this

agency, but the corporate responsibility is that of a private corporation. (*Panama Ry. Co.* vs. *Curran*, 256 Fed. 768.)

We think there was no lawful suspension of the obligation to pay which is imposed upon the defendant-in-error pursuant to Article 1510 of the Naval Regulations and that the plaintiff-in-error having transported the gold as the commanding officer of the ship "Laub" is entitled to recover pursuant to the statute and the Naval Regulations.

Judgment reversed.

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

against

WALLACE B. PHILLIPS,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for Plaintiff-in-Error,
42 Broadway,
New York, N. Y.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX.

PAGE

STATEMENT OF CASE 1–11

POINT I.

The case is appealable to this court.... 11–17

POINT II.

Apart from the Statute and regulations upon which the plaintiff relies, it is clear that he must show a contract, express or implied in fact, between himself and the defendant, binding the latter to pay freight for the transportation of gold on a vessel which the plaintiff did not own..... 18–20

POINT III.

There was no express contract to pay for the carriage of the gold..... 20

POINT IV.

No contract can be implied from the regulation, because it had been duly suspended 20–28

POINT V.

But even if the regulation had not been suspended, still there can be no implication of a contract because (*a*) the plaintiff was under orders to carry the gold, and (*b*) the circumstances negatived any intention of the defendant to contract or to express any desire to do so 28–46

PAGE

POINT VI.

Neither the statute nor the regulation inherently binds the defendant; they are disciplinary in their nature and apply only to persons who are members of the naval forces 47–51

POINT VII.

The statute and regulation are permissive merely; they allow the officer to make a contract, but do not create one for him 52–59

POINT VIII.

Neither the statute nor the regulation was intended to give the plaintiff even permission to make a charge to a coordinate agency of the government like the defendant 60–69

POINT IX.

Even if the regulation was mandatory and applicable to the defendant, it could not operate because it had been duly suspended as shown in Point 4 hereof 70

APPENDIX A.

Extract from *Naval Digest*, 1916..... 71–72

APPENDIX B.

Extract from *Pepys Memoires*, Relating to the State of the Royal Navy of England, For Ten Years, Determin'd December, 1688, printed Anno. MDCXC, pp. 101-9, 115-19, 124-6... 73–76

List of Cases Cited.

PAGE

Adams *v.* United States, 42 Ct. Cl. Rep. 211 24–26

Beautelle *v.* Magone, 157 U. S. 154..... 17
Brisbane *v.* Dacres, 5 Taunt. 144.....56, 57, 58, 59
Butte, etc., Copper Co. *v.* Clark Co., 249 U. S. 12; 39 Sup. Ct. 231..... 11, 13

Cartas *v.* United States, 250 U. S. 545..27, 32, 44, 48, 51, 52, 54, 58, 59, 64
Cartas *v.* United States, 48 Ct. Cl. 161..... 32, 52
Citizens Bank *v.* Steamboat Co., 2 Story, 16, Fed. Case No. 2730.....32, 46, 51, 53-54
Cole Mfg. Co. *v.* Mendenhall, 240 Fed. 641.. 15
Crenshaw *v.* United States, 134 U. S. 99.... 26
Cumberland Glass Co. *v.* DeWitt, 237 U. S. 447; 35 Sup. Ct. 636..... 12

Delaware, etc., Ry. *v.* Yukonis, 238 U. S. 439; 35 Sup. Ct. 902..... 12

Earl *v.* Coburn, 130 Mass. 596..... 44

Ferbach Co. *v.* Russell, 233 Fed. 412..... 15
Frey *v.* Cudahy, 41 Sup. Ct. 451..... 15

Gandia *v.* Cadierno, 233 Fed. 737..... 15
Gausse *v.* Commonwealth Trust Co., 196 N. Y. 134..... 61
Grafton *v.* Gentry, 240 Fed. 646..... 15
Grimley, *In Re*, 137 U. S. 147..... 30, 50
Grimwood *v.* Munson S. S. Line, 273 Fed. 166 38

Hamilton *v.* Dillon, 21 Wall. 73..... 68
Hanford *v.* Davies, 163 U. S. 273..... 13
Harriman Nat'l Bank *v.* Seldomridge, 249 U. S. 1; 39 Sup. Ct. 244..... 12
Hodgson *v.* Fullarton, 4 Taunt. 787.....56, 57, 59
Hull *v.* Burr, 234 U. S. 712; 34 Sup. Ct. 892 13

PAGE

Kansas, etc., Ins. Co. *v.* Burman, 141 Fed. 835 38–39
Kirkman *v.* McClaughry, 160 Fed. 436..... 23
Little Rock Ry. *v.* St. Louis Ry., 63 Fed. 775 34
Milligan, *Ex Parte*, 4 Wall. 2..... 51
Pacific Railroad Removal Cases, 115 U. S. 1. 15
Pioneer S. S. Co. *v.* Jenkins, 189 Fed. 312.. 15
Railway Co. *v.* McCarthy, 96 U. S. 258..... 38
The Reform, 3 Wall. 617..... 68
Schwenka *v.* Wyckoff, 46 N. J. Eq. 560..19, 27, 67
Sloan Shipyards Corp. *v.* U. S. Shipping Board, 42 Sup. Ct. 386..... 16, 60
Smith *v.* Whitney, 116 U. S. 167..... 23, 50
Spiller *v.* Atchison, etc., Ry., 253 U. S. 117; 40 Sup. Ct. 466..... 11, 14
Tanner *v.* Ballard Co., 273 Fed. 671..... 17
Thomsen *v.* Cayser, 243 U. S. 66; 37 Sup. Ct. 353 14
Title Guaranty, etc., Co. *v.* Pam, 232 N. Y. 441 38
Wallace *v.* United States, 257 U. S. 541.... 27
Wood *v.* Wilbert, 226 U. S. 384..... 15

Naval Digest, 1916..... 23
Pepys Memoires Relating to the Royal Navy 56
Tedder, The Navy of the Restoration, p. 67. 56

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

AGAINST

WALLACE B. PHILLIPS,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Case.

This is a writ of error to review an order of the Circuit Court of Appeals, Second Circuit, reversing a judgment which the District Court theretofore had rendered in favor of the defendant, which is the plaintiff-in-error here (Reported 279 Fed. 244).

This action was commenced in the United States District Court for the Southern District of New York, at law, by Wallace B. Phillips (defendant-in-error herein) as plaintiff, against the plaintiff-in-error as defendant. Hereinafter, therefore, the plaintiff-in-error will be styled the defendant, and the defendant-in-error the plaintiff. The issues were tried on November 13, 1920, before Hon. Learned Hand, *D. J.*, and a jury of one.

Both sides moved at the conclusion of the case for the direction of a verdict. Judge Hand directed a verdict for the defendant (Rec. 12), and judgment for the defendant was entered accordingly on December 21, 1920 (Rec. 18). The plaintiff herein appealed from this judgment, by way of writ of error, to the Circuit Court of Appeals for the Second Circuit. On January 19, 1922, the Circuit Court of Appeals reversed the decision of the District Court. The mandate to be entered on the opinion of the Circuit Court of Appeals would, in ordinary course, have directed a new trial; but, the facts not being in dispute and the defendant desiring an early review of the case by this Court, it moved, that the mandate should direct the entry of final judgment for the plaintiff instead of directing a new trial of the cause. This motion was granted, and the mandate issued accordingly (Rec. 70).

In October 9, 1922, this Court, on the defendant's motion, ordered the advancement of this case on its calendar.

The facts actually are not in dispute; nor are they as a matter of law, both sides having moved for the direction of a verdict (Rec. 12, 17). Briefly they present the following case:—

The Facts.

The plaintiff seeks to recover the sum of $51,700 (Rec. 5, 24) from the defendant; this sum being claimed as a commission due the plaintiff for the transportation in September and October, 1919, of a certain quantity of gold, amounting to $5,170,000, belonging to the defendant. The plaintiff claims this by virtue of two Federal statutes and a Navy Regulation (Rec. 5, 24). The statutes provide

(*a*) that the regulations issued by the Secretary of the Navy, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner, and (*b*) that any officer who takes on board his vessel, for freight or safekeeping, any merchandise except gold, silver or jewels, shall be guilty of a military offense triable by a naval court martial. The Navy Regulation provides that when gold is placed on board ship for freight or safe keeping, as provided by the statute above mentioned, the commander shall sign bills of lading for the amount and be responsible therefor, and that "the usual percentage shall be demanded of the shippers".

Section 1547 of the U. S. Revised Statutes provides as follows:

> "The orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner."

Article 13, Section 1624, of the Revised Statutes of United States is one of the "Articles for the Government of the Navy", and the opening paragraph of these articles reads as follows:

> "The navy of the United States shall be governed by the following articles."

Then follow various provisions, which, generally speaking, are similar to the Articles of War governing the army, and which set forth various naval offenses and the punishments therefor. They may

be said to constitute the naval criminal code. Article 13 provides as follows:

> "Such punishment as a court martial may direct may be inflicted on any person in the Navy who * * * (13) * * * takes, receives or permits to be received on board the vessel to which he is attached, any goods or merchandise, for freight, sale or traffic, except gold, silver or jewels for freight or safe-keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels without authority from the President or the Secretary of the Navy."

Article 1510, *Navy Regulations*, (1913) provides:

> "When gold, silver or jewels shall be placed on board of any ship for freight or safe keeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows: One-fourth to the commander in chief, one-half to the commanding officer of the ship; one-fourth to the Navy Pension Fund. To entitle the commander in chief to receive any part of the amount, he must have signified to the commanding officer of the ship, in writing his readiness to unite with him in the responsibility for the care of the treasure or other valuable. Where a commander in chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

The plaintiff is a United States Naval officer, and in the summer of 1919 was in command of the U. S. S. S. "Laub", a destroyer of the United States Navy, then stationed in Turkish waters.

The defendant is a corporation organized during the summer of 1917 (Rec. 44), pursuant to an Executive Order issued by the President of the United States, acting under authority of the Act of Congress of August 10, 1917, known as the "Food Control Act" or the "Lever Act" (40 Stat. 276). It was incorporated under the Business Corporations Law of the State of Delaware, and all of its capital stock has been at all times, and now is, owned by the United States of America (Rec. 27). The purpose for which the defendant was organized was to act as an agency to handle grain during the period of the war, under the direction and supervision of the United States Food Administration and of the United States Food Administrator, Hon. Herbert Hoover.

In the early part of 1919, under authority of an Act of Congress dated February 25, 1919, and an Executive Order of the President of the United States, dated March 1, 1919, the American Relief Administration was organized for the purpose of extending relief, particularly in the nature of foodstuffs, to the needy populations of Europe; and the defendant was designated as an agency to assist and simplify the work of this Relief Administration in these countries (Rec. 51).

Pursuant thereto, the defendant entered into an agreement with the Government of Bulgaria, in March, 1919, whereby it sold a large quantity of wheat and other foodstuffs to that Government, and in payment therefor received gold coin from the Government aggregating upwards of $5,000,000 (Rec. 32, 33). This gold coin was delivered to the defendant, through its duly authorized representative at the port of Varna, Bulgaria; and, at various times during the spring and summer of 1919, it was

transported from Varna to Constantinople for the defendant, on various United States war vessels stationed in or about the latter port. Thereafter the gold was stored on board various United States war vessels in the harbor of Constantinople, and was finally all placed on the U. S. S. "Galveston" in said harbor for safekeeping (Rec. 9, 36).

Then the defendant, being desirous of shipping the gold to the United States, applied to the United States Navy Department for permission to ship the gold from Constantinople to the United States on board a United States war vessel, and requested the Navy Department to suspend the above mentioned Section 1547 of the United States Navy Regulations, permitting the commander of a Naval vessel on which gold is transported to charge a commission for such transportation. On August 10, 1919, Admiral Knapp at the request of the defendant sent the following cablegram to the Secretary of the Navy:

> "Serial No. Mission 555. Relief Administration desires ship about five millions gold to the United States from Constantinople on board a destroyer and is willing to keep gold insured and release Captain from all responsibility except such as is usually incumbent for care of public property. Under circumstances will department suspend mandatory provisions of Article 1510 Navy Regulations, including percentage charge and direct that shipment be received for transportation as desired" (Rec. 38).

On August 16th, Secretary Daniels replied to Admiral Knapp as follows:

> "Your mission 555 approved. Department suspends mandatory provisions Article 1510 Navy Regulations including percentage charge

upon commanding officer with release for himself and United States Government from all responsibility as per your mission 555. Papers must be certified and signed by proper officials" (Rec. 38).

As we have said, the plaintiff was then in command of U. S. S. *Laub,* lying in Constantinople harbor. His immediate superior was Captain Greenslade (Rec. 41). Captain Greenslade's immediate superior was Admiral Bristol, the latter's immediate superior was Admiral Knapp (Rec. 41), and the ultimate superior of all these officers in their hierarchy was the Secretary of the Navy (Rec. 36).

On September 10, 1919, Captain Greenslade ordered the plaintiff to bring the *Laub* alongside the *Galveston,* to take the gold on board, and, as soon thereafter as practical, to transport it to the port of New York. At the time of receiving these orders from Captain Greenslade, the plaintiff was informed by the latter of the substance of Secretary Daniels' cablegram of August 16th. Accordingly, on September 15th, the plaintiff brought the *Laub* alongside the *Galveston* and took the gold on board (Rec. 35).

The defendant's representative and agent in this transaction was Major Galbraith, who represented the defendant in that part of Europe (Rec. 20-21).

Major Galbraith came and delivered to the plaintiff a document, the body of which was as follows:

> "In accordance with authority vested in me by Mr. Herbert Hoover, United States Food Administrator, I hereby release yourself and the United States Government from all responsibility covering shipment of approximately five millions gold to the United States from Constantinople on board the U. S. S.

Laub, except such responsibility as is usually incumbent for the care of public property. Copy of cable from Secretary of Navy attached in which department suspends mandatory provisions Article 1510 Navy Regulations.

Yours truly,

L. C. GALBRAITH,
Major Q. M. Corps,
U. S. Army,
Officer in Charge United States
Food Administration"

(Rec. 36-38).

The cable mentioned in this document was that of Secretary Daniels dated August 16th, quoted above. The plaintiff thereupon gave Major Galbraith a letter, the body of which was as follows:

"You are hereby informed that I cannot accept your release * * * from responsibility covering shipment of approximately five million dollars gold to the United States on this vessel. The gold was received from the Commanding Officer U. S. S. *Galveston* to whom I have given receipt for same and I take full responsibility for the transportation of the gold to the nited States. Copy of this letter furnished to Senior U. S. Naval Officer, Turkey.

W. B. PHILLIPS,
Lt. Cmdr. U. S. N."

(Rec. 39).

On the same day the plaintiff received an order, designated "Movement Order No. 46", from Admiral Bristol, ordering him to proceed from Constantinople to New York, authorizing the plaintiff to receive on board prior to sailing, the gold then on board the *Galveston,* and stating that Major Galbraith would accompany the plaintiff as passenger from Constantinople to New York, and

upon arrival the gold should be disposed of as requested by Major Galbraith. A copy of Secretary Daniels' telegram of August 16th was also attached to this order (Rec. 37).

The plaintiff thereupon set sail for New York with the gold and Major Galbraith on board (Rec. 41), and on arrival here turned the gold over to the defendant (Rec. 41).

Prior to shipping the gold, defendant had the gold insured in accordance with Admiral Knapp's telegram of August 8th to the Secretary of the Navy (Rec. 41).

The Contentions of the Parties, and the Decisions Below.

The defendant's contention, consistently made in both courts below, is here repeated.

The plaintiff's argument has always been that the statute and regulation bound your petitioner, and that "the shipper placing gold on board a naval vessel for transportation implied agrees to pay the compensation provided for in the navy regulations"; there being "no navy regulation which admits of an exception"; and that the regulation was not duly suspended in the present case.

In the District Court Learned Hand, *J.*, upheld the defendant's contention (Rec. 65-70), and accordingly directed a verdict for the defendant. The Circuit Court of Appeals on the contrary, sustained the plaintiff's contention, using the language quoted above (Rec. 68) and therefore reversed the judgment entered on the verdict.

Summary of Points and Assignments of Error.

1. *The case is appealable to this Court.*

2. *Apart from the Statute and regulations upon which the plaintiff relies, it is clear that he must show a contract, express or implied, in fact, between himself and the defendant, binding the latter to pay freight for the transportation of gold on a vessel which the plaintiff did not own.*

Assignments of Error 18-19, 30-1 (Rec. 76, 77).

3. *There was no express contract to pay for the carriage of the gold.*

Assignments of Error 18-19, 31 (Rec. 76, 77).

4. *No contract can be implied from the regulation, because it had been duly suspended.*

Assignments of Error 6, 12, 15 (Rec. 75-6).

5. *But even if the regulation had not been suspended, still there can be no implication of a contract because (a) the plaintiff was under orders to carry the gold, and (b) the circumstances negatived any intention of the defendant to contract or to express any desire to do so.*

Assignments of Error 8, 20, 24, 28-30 (Rec. 75-7).

6. *Neither the statute nor the regulation inherently binds the defendant; they are disciplinary in their nature and apply only to persons who are members of the naval forces.*

Assignments of Error 2, 3, 5, (Rec. 74-5).

7. *The statute and regulation are permissive merely; they allow the officer to make a contract, but do not create one for him.*

Assignment of Error 26 (Rec. 77).

8. *Neither the statute nor the regulation was intended to give the plaintiff even permission to make a charge to a co-ordinate agency of the government like the defendant.*

Assignments of Error 5, 14 (Rec. 75).

9. *Even if the regulation was mandatory and applicable to the defendant, it could not operate because it had been duly suspended as shown in Point 4 hereof.*

Assignment of Error 12 (Rec. 75).

I.

The case is appealable to this Court.

This appeal rests on the rule that an appeal lies as of right to this Court if the suit below was based upon a Federal Statute. (*Spiller* v. *Atcheson, etc., Railway*, 253 U. S. 117, 40 Sup. Ct. 466; *Butte, etc. Copper Co.* v. *Clark Co.*, 249 U. S. 12, 39 Sup. Ct. 231). Thus a plea of *res judicata* based on a set-off in bankruptcy was held to raise a Federal question because it involved the Bankrupt Act.

> "The Federal question, which is the basis of jurisdiction here, arises upon the plea of *res judicata* to which a demurrer was sustained in the Maryland court of original jurisdiction, which judgment was affirmed by the court of appeals. This presents a Federal question because the plea of former judgment in a Federal court adjudicating a right of Federal

> origin asserts a right which, if denied, made the case reviewable here under § 709, Revised Statutes, § 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214)."
>
> *Cumberland Glass Co.* v. *DeWitt* (237 U. S. 447, 35 Sup. Ct. 636, 637).

> "The case is before us on error to the judgment of the court below affirming that of the trial court, our jurisdiction to review resulting because the case from its inception involved the enforcement of the National Banking Act, and therefore, was not dependent in the trial court solely upon diversity of citizenship."
>
> *Harriman National Bank* v. *Seldomridge* (249 U. S. 1, 6; 39 Sup. Ct. 244, 245).

And while "it is well settled that, in order to review the judgment of the circuit court of appeals, jurisdiction in the district court must not have vested upon diverse citizenship alone, but that jurisdiction must in part, at least, have arisen because of averments showing a cause of action under the Constitution or laws of the United States" (*Delaware, &c. Ry.* v. *Yukonis*, 238 U. S. 439, 35 Sup. Ct. 902), yet if a Federal question clearly appears on the face of the complaint, it does not matter that the jurisdiction of the court is also invoked on the ground of diversity of citizenship. Thus this court decided in a case where counsel for the plaintiff undertook, after having alleged in his complaint that the case was grounded on the Federal statute, to recant when the defendant appealed here. This Court held that it had jurisdiction, saying:

> "The allegation, therefore, was part of appellees' case—fortified the other allegations as grounds of suit and recovery—and made the suit one involving the construction and appli-

cation of that section. The motion to dismiss is, therefore, denied."

Butte, etc., Copper Co. v. *Clark Co.* (249 U. S. 12; 39 Sup. Ct. 231, 233).

It is not even necessary for the complaint expressly to claim jurisdiction on the ground of a Federal question. It is enough if the complaint substantially shows that to be the case.

Hull v. *Burr* (234 U. S. 712, 34 Sup. Ct. 892);

Hanford v. *Davies* (163 U. S. 273).

The complaint in the present case clearly presents a Federal question, because the plaintiff's entire case rests on the effect to be given to the Statutes and Naval Regulations (issued of course pursuant to Federal statute) to which we referred in our preceeding statement of the facts. The plaintiff's position, which has received the approval of the Circuit Court of Appeals, is that the Statute and Naval Regulation bind all persons, and that hence the shipper "impliedly agrees to pay the compensation provided for the navy regulations". Accordingly the plaintiff's suit rests on the statute and regulations, and so he pleads them in his complaint (Rec. pp. 4-5). His brief below opens its argument with a flat statement to the same effect (p. 9). The Circuit Court of Appeals says that his theory is "that by virtue of * * * the Statutes and * * * the Regulations * * * he was authorized to receive on board gold for freight or safekeeping, and was entitled to compensation," etc. (Rec. p. 67). This proposition the defendant respectfully denies and, if its denial is sound, then the plaintiff cannot recover, for he has neither pleaded nor shown any agreement, actual or im-

plied in fact, for compensation. Unless he can recover *ex vi* the Statute and Regulation he must of necessity lose.

While in cases of this class it is "elementary that this writ [of error] will lie to review final judgments only" (*Spiller* v. *Atcheson, &c., Ry.*, 253 U. S. 117, 40 Sup. Ct. 466), here final judgment was ordered by the Circuit Court of Appeals in connection with its reversal of the judgment below (Rec. 70). It is true that this direction was made on motion of the defendant (plaintiff-in-error here) but the defendant's motion papers (omitted from the transcript, but which we have asked to have added to the record) show that defendant, desiring an early review of the case by this Court, moved, on the same situation as existed in *Thomsen* v. *Cayser* (243 U. S. 66, 37 Sup. Ct. 353), that the mandate of the Circuit Court of Appeals should direct the entry of final judgment for the plaintiff below (defendant-in-error herein) instead of directing a new trial of the cause.

This having been done, the case is appealable as of right, and should be considered on the merits.

> "We are not concerned with what the circuit court might have done, but only with what the circuit court of appeals did and the jurisdiction it possessed. It received and granted a petition for rehearing, ordered a recall of the mandate previously issued, set aside the judgment of the circuit court, and remanded the case with directions to dismiss the complaint. The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay."
>
> *Thomsen* v. *Cayser* (243 U. S. 66, 37 Sup. Ct. 353, 358).

It is true that in such a case the judgment will be affirmed if a single one of the assignments of error which the plaintiff (defendant-in-error here) had made in the Circuit Court of Appeals should have been well taken (*Frey* v. *Cudahy*, 41 Sup. Ct. 451). But all of these assignments, save one, simply bring up the questions which we desire to argue here; and the single exception consists of an assignment (No. 43, Rec. p. 59) which is unintelligible and therefore entitled to no consideration, as in fact it received none in the Court below.

Wood v. *Wilbert* (226 U. S. 384);
Cole Mfg. Co. v. *Mendenhall* (240 Fed. 641);
Grafton v. *Gentry* (240 Fed. 646);
Pioneer S. S. Co. v. *Jenkins* (189 Fed. 312);
Gandia v. *Cadierno* (233 Fed. 737);
Ferbach Co. v. *Russell* (233 Fed. 412);
And other cases there cited.

There is another reason why this case is appealable.

Where a corporation is organized under an Act of Congress, every suit against it is a suit "arising under the laws of the United States", within the statute authorizing the removal of a case into the United States courts, and it is impossible for such a company to "have a case which does not arise literally as well as substantially under the law" (*Pacific Railroad Removal Cases*, 115 U. S. 1, 13).

In the recent cases of the Emergency Fleet Corporation, this Court said:

> "It is suggested that there will be lack of uniformity if suits can be brought in state courts. This consideration cannot control our conclusion from the statutes. But it is not

> very serious since such suits against this corporation can be removed to the Courts of the United States, *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, and afterwards are subject to review here. *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U. S. 246, 258, 32 Sup. Ct. 822, 56 L. Ed. 1074; *Southern Pacific Co.* v. *Stewart*, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345; *Id.*, 248 U. S. 562, 38 Sup. Ct. 203, 62 L. Ed. 472. The change in the law by the Act of January 28, 1915, c. 22, § 5, 38 Stat. 803, 804 (Comp. St. § 1233*a*), extends only to railroads."
>
> *Sloan Shipyards Corp.* v. *United States Shipping Board* (42 Sup. Ct. 386, 389).

This language applies to the present case. The Emergency Fleet Corporation, with respect to which this Court spoke, was organized under the general corporation laws of the District of Columbia. The defendant at bar was organized under the general corporation laws of the State of Delaware; but there is no distinction in this, because a corporation organized under the laws of the District has no other or different status, so far as citizenship in the Federal courts is concerned, than a corporation organized under the laws of a State. It is true that Congress, by statute, expressly authorized the formation of a corporation, and that the Emergency Fleet Corporation was organized pursuant to this. But there again is a distinction without a difference, because the defendant was organized pursuant to executive order, the President's authority therefor flowing from what the Circuit Court of Appeals has called the "extraordinary powers" vested in him by the Lever Act (Rec. 66). The authority for the formation of the defendant, therefore, is percisely the same as the authority for the formation of the Emergency Fleet

Corporation; each was a business corporation organized under the general laws of a State or District as distinct from a special act of Congress, and each traces the authority for its formation to an act of Congress; the Emergency Fleet Corporation directly, because the act to which it refers authorized a corporation to be formed, but the defendant at bar just as directly in law, because it was formed pursuant to Presidential proclamation issued under the authority of the extraordinary powers which an act of Congress had vested in the President.

The facts appeared by stipulations, together with the testimony of one witness. Both sides having moved for the direction of a verdict, the only question before this Court, as it was before the Circuit Court of Appeals, is the correctness of the District Court's judgment on the law, every inference of fact being taken in favor of the verdict.

Tanner v. *Ballard Co.* (273 Fed. 671);
Beaattelle v. *Magone* (157 U. S. 154);
And cases there cited.

II.

Apart from the Statute and Regulation upon which the plaintiff relies, it is clear that he must show an actual contract, express or implied in fact, between himself and the defendant, binding the latter to pay freight for the transportation of gold on a vessel which the plaintiff did not own.

It was not disputed below, nor has the plaintiff contended to the contrary, that this suit (*a*) is in the plaintiff's individual capacity, and (*b*) is to recover freight money for the transportation of goods on a Government vessel.

All that the plaintiff had to do with the transportation was to command the vessel on her voyage over. Ordinarily in any suit for freight, the plaintiff is the owner or at least the charterer or lessee of the vessel. Nothing of the sort occurred here. The United States of America owns the vessel in question. It was at that time in her commission and operation. The plaintiff was on the national pay-roll as a Naval officer, and it was wholly the chances of the service that allowed of his being on board the U. S. S. *Laub* rather than any other vessel at the particular moment.

On the face of it, this suit is unusual, and the very facts which have been stated would require the plaintiff to point to some particular rule of law or statute binding upon the defendant as well as upon himself, which would justify him in claiming that the defendant should pay him personally—*not the Government of the United States but the plaintiff*

personally,—freight money for having commanded the vessel on the voyage from Constantinople to New York.

For the voyage itself the Government already has paid the plaintiff. This compensation consisted of the pay attached to his rank as Lieutenant Commander, and for that pay the Government, in the point of view of a court of common law as much as in the spirit of the service, expected from him the performance of any order which he might receive, notwithstanding the hardship and notwithstanding the pecuniary loss. It is because of this high expectation that courts of common law have uniformly held that an officer's pay is not assignable.

> "It was apparent that the salary or remuneration incident to a public office, as a rule, was essential to a decent and comfortable support of the incumbent. If the officer should be deprived of his support, there would arise a hazard of his being driven to an inappropriate means of living, of his being harassed by the worry of straitened circumstances, *and tempted to engage in unofficial labor,* and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive." (Italics ours.)
>
> *Schwenka* v. *Wyckoff* (46 N. J. Eq. 560, 9 L. R. A. 221).

The plaintiff being paid by his own employer for the voyage, and not owning the ship which made the voyage, clearly he must show something which obligates the defendant to pay him,—not his employer but him,—for having commanded a vessel which he did not own on a voyage which he was under orders to make.

Obviously such an obligation can be only in the shape of a statute *binding the defendant* or a contract made between the plaintiff and the defendant.

As we have said (Point I, supra) neither does the plaintiff claim, nor did the Circuit Court of Appeals hold, that there was any obligation upon the defendant other than as created by the statute, and the regulation enacted by leave of the statute, to which we have referred. But, lest the plaintiff be given the benefit of any doubt in that regard, we shall, in the next three points (III, IV and V) show that no contract to pay freight actually was made, expressly or by implication; thus leaving the plaintiff committed to the single question whether the statute and regulation imposed an obligation upon the defendant anyhow.

III.

There was no express contract to pay for the carriage of the gold.

There is not a scintilla of evidence to that effect.

IV.

No contract can be implied from the regulation, because it had been duly suspended.

Unquestionably the plaintiff could make no charge without the sanction of such a regulation. The statute itself merely exempts from punishment, cases where gold is carried. It does not allow the officer to charge anything, it simply provides that the carriage of gold shall not be an offense against discipline. Something more than the statute was needed to make it regular in the service for the

officer to receive any private emolument in such a case, and therefore the Regulation permits the officer to charge "the usual commission". The "usual commission" means the ordinary freight for gold, and the case stipulates accordingly (Rec. 36, 37), so what the Regulation does is to permit the officer to charge the same rate of freight that a merchantman would charge. *The permission, therefore, comes from the Regulation, not the statute.* This the plaintiff recognized when he pleaded the Regulation as part of his cause of action (Rec. 4, 5). If the Regulation were not of force the plaintiff could not recover in any event; and this he recognizes when he argues that the Secretary had no power to suspend it.

The Secretary's telegram (Rec. 38) is discussed by the Circuit Court of Appeals in a connection different from that of the above point. The Circuit Court of Appeals, as we have previously said, does not consider that the defendant made an actual contract, and hence it does not discuss the Secretary's telegram from that point of view. But, drawing as it does the defendant's liability from the regulation, the Circuit Court of Appeals was bound to consider whether its major premise existed in view of the fact that the Secretary had suspended the regulation. And so the Circuit Court of Appeals considers the Secretary's powers in this regard, reaching the conclusion that the Secretary had no power to suspend the regulation at all (Rec. 68).

At the present moment we present the subject from a different standpoint. It might have been argued that, even though the regulation did not bind the defendant, yet in view of its existence, the defendant might have been taken as impliedly

contracting, as a matter of actual contract arising by implication,—to pay freight. Against that our argument is directed.

But from either point of view the question is the same, whether the Secretary had the power to do what he did or not.

The Circuit Court of Appeals says that the Secretary had no such power because (*a*) he has no authority "to diminish an officer's compensation as established by law", and here he "attempted to suspend Article 1510 [the regulation already quoted by us *supra*] in so far as it provided compensation for services rendered" (Rec. 68), and (*b*) he could not, under Article 901 of the Regulations, suspend any regulation without the President's approval, and this approval was not shown to have been obtained (Rec. 68). We shall discuss these points in their reverse order,

(a) *As to Presidential approval of the suspension:*

The Revised Statutes of the United States provide as follows:

> "The orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may have adopted with the approval of the President shall be recognized as the regulations of the Navy subject to alterations adopted in the same manner" (U. S. R. S., § 1547).

The regulation in question was one adopted by the Secretary of the Navy prior to July 14, 1862. While no cases in the Courts can be found authorizing the suspension by the Secretary of the Navy of such a regulation, nevertheless, it is clear that the same has often been done according to the custom

of the navy; and the Judge Advocate General of the Navy has given several opinions sustaining the right of the Secretary so to suspend such a regulation in any given case. The Naval Digest, 1916, is a volume printed by the government printing office and contains a digest of the decisions of the Judge Advocate General of the Navy. We annex to this brief the provisions of this digest which we have found relating to this point. From these it appears that, according to the current of authority in the Judge Advocate General's office, a regulation can be suspended, according to the custom of the service, in an individual case.

While such opinions of the Judge Advocate General of the Navy may not have the same force in a court of law as decisions of a court, nevertheless they are entitled to the greatest respect, especially in a case, as this, involving naval customs and usages and the accepted rights of the Navy Department and the officers under its command. The Supreme Court has indeed quoted with approval the opinion of an English colonial judge that on questions of military law or usage "common law judges have no authority either from their law books or from the course of their experience to inform themselves", and that hence great respect should be paid to the opinions of members of the sevice which have been acted on in the service (*Smith* v. *Whitney*, 116 U. S. 167). A recent illustrative case in this connection is *Kirkman* v. *McClaughry* (160 Fed. 436), where the court, in upholding on *habeas corpus* the record of a court martial inflicting a cumulative sentence, said that it had learned "from recognized sources of authority that, in the military service, it is a well-established and long-continued practice to regard

sentences of court martial such as are here under consideration as cumulative".

It is true that in some passages of the extract we thus give from this digest appear remarks to the effect that the President must approve suspensions. This idea, however, does not appear to have received acceptance, as appears by reading the extract as a whole; and it cannot be upheld by common law courts in view of express authority to the effect that the Secretary of the Navy in all actions concerning regulations, whether in promulgating them or abrogating them, is conclusively presumed to act with the approval of the President. The courts have laid this proposition down in cases directly affecting the rights of officers; and hence it follows that no officer can raise the point in any common law court.

> "It is insisted that the Secretary of the Navy had no authority to issue that order; that the first regulation referred to had the approval of the President, pursuant to Revised Statutes, section 1547, while the order was issued by the Secretary, without the approval of the President, and that therefore the claimant is entitled to the benefit of the provisions of the first regulation. True, the regulations of the Army and Navy have the force of law with respect to the person or subject-matter over which the Secretary has official control. (*Gratiot* v. *United States,* 4 How. 80; *Smith* v. *Whitney,* 116 U. S. 167.) Such regulations, however, to have the force of law, must conform to the law. (*Symonds Case* (21 C. Cls. R. 148), affirmed on appeal, 120 U. S. 46.) Under Revised Statutes, section 1547, the orders, regulations, and instructions issued by the Secretary of the Navy, as well as alterations thereof, are presumed to have been issued 'with the approval of the President' though they do not bear his signature. In the case

of *Truitt* v. *United States* (38 C. Cls. R., 398, 403), respecting the power of the President to act for the heads of the several Departments, the court said: 'There can be no question but that the President may legally act through the head of a department. It may be said in general that while the superintendence of the administration devolves upon the President, he cannot be required to become the head of every department for the performance of ministerial acts under his own hand, and such was the effect of the ruling in the case of *Williams* v. *The United States* (1 How., 290). That case followed the case of *United States* v. *Eliason* (16 Peters, 291, 302), where it was held, in respect of the rules for the regulation of the Army, that "the Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; the rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority"; and further, that "such regulations cannot be questioned or defied because they may be unwise or mistaken". Later, in the case of *Runkle* v. *United States* (122 U. S. 543, 557), in respect of the right of the President to act through the Secretary of War in the approval of the proceedings and sentence of a court-martial dismissing an officer from the United States Army, it was said: 'There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of Departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox* v. *Jackson*, 13 Peters, 498, 513; *United States* v. *Elia-*

son, 16 Peters, 391, 392; *Confiscation Cases*, 20 Wall., 92, 109; *United States* v. *Farden*, 99 U. S., 10, 19; *Wolsey* v. *Chapman*, 101 U. S., 755, 769'."

Adams v. *United States* (42 Ct. Cl. Rep. 211, 212).

It is conceivable that, if the plaintiff had taken the gold on board at Constantinople without anything having been said or done with regard to the suspension of the Regulation and had taken it to New York and delivered it to the defendant; and then later, *after all this had been done*, the Secretary had suspended the provisions of the Regulation, then, so far as that particular transaction was concerned, the plaintiff would have some ground for complaint. But here the suspension of the Regulation was made by the Secretary before the plaintiff ever received the gold on board, and at the time of taking it on board the plaintiff knew exactly where he stood: that this Regulation was suspended by the Secretary (Rec. 36), and as was pointed out above, the Secretary had full power and authority so to suspend such a Regulation.

Nor did the Secretary's action impair any right of the plaintiff, constitutional or otherwise.

(b) *The suspension did not diminish any vested right of the plaintiff.*

An officer's commission is not a contract; he has no vested right to any emoluments except as expressly given by statute (*Crenshaw* v. *U. S.*, 134 U. S. 99). And this court has lately decided that the President, at least with the Senate's concurrence, can effect his removal by the simple process of recalling his commission and appoint-

ing another in his place (*Wallace* v. *U. S.*, 257 U. S. 541). *Here no statute forbids the cutting off of the emolument which the plaintiff claims. It was not created by statute, but by a regulation* which can be amended, altered or changed by the Secretary without any further statutory authority or legislative action, and, as has been shown, it can be suspended in a given case. An officer's pay is the exact measure of all things that he does under the regulations and laws of his service, and the very object of the pay is to remove from him the temptation to engage in unofficial enterprises (*Schwenda* v. *Wyckoff*, 46 N. J. Eq. 560) such as this Court holds this to be (*Cartas* v. *U. S.*, 250 U. S. 545). The Secretary therefore deprived the plaintiff of no right or color of right by suspending this Regulation.

The foregoing goes to the point that in the particular instance of this one shipment of gold for the defendant, there was a suspension of the regulation validly made by the Secretary of the Navy. As appears from the facts, this suspension, contained in the cablegram of Admiral Knapp and the Secretary's reply, was intended to and did actually apply only to this particular shipment. But even if the Secretary had never taken this action in the particular case, we submit that the regulation had been generally suspended, insofar as it would apply to the defendant at any time, by the Executive Order of the President of August 10, 1917, which, in speaking of the Food Administrator's activities and purposes, specifically directs all departments of the Government to cooperate with him in the avoidance of "a duplication of effort and funds" (Rec. 44). Although this executive order applied to the Food Administrator, nevertheless the de-

fendant was organized as an agency to assist such Administrator in carrying out the detailed functions of his office, and therefore it necessarily follows that the direction contained in the executive order of August 10, applied directly to the Food Administrator's agency, the defendant here. This being the case, it would seem that under the very terms of this executive order, all regulations, customs and orders which would result in a "duplication of efforts and funds" between the defendant and any other department of the Government had been suspended. It is true that the President did not specify the particular regulation in question or any other particular regulation or custom, but his executive order generally applied to any situation where a duplication of efforts or funds would be likely to arise, as would clearly be the case here, if the plaintiff should prevail.

V.

But even if the regulation had not been suspended, still there can be no implication of a contract, because (*a*) the plaintiff was under orders to carry the gold, and (*b*) the circumstances negative any intention of the defendant to contract or to express any desire to do so.

The District Judge below says:

> "If the plaintiff was under orders to carry the gold, he could not earn any commission whether the article was suspended or not. The statute and the article together only gave him

> leave to make a contract, and did not of themselves create any obligation against a third party. The only possible obligation would be a contract implied from the defendant's request, and such a contract required a consideration or it was *nudum pactum*. But, if the plaintiff was in fact under unconditional orders to carry the gold, his consent or even his promise to do so was not a valid consideration.
>
> "The case comes down, therefore, to this: Was the plaintiff ordered to carry the gold, and was that order valid?" (Rec. 14).

The learned Judge goes on to refer to Captain Greenslade's order to the plaintiff to carry the gold. This was given on September 10, 1919 (Rec. 35), and Judge Hand considers that this order was superseded by Admiral Bristol's order of September 15 (Rec. 14). Admiral Bristol's order, however, enclosed with it the cable of the Secretary of the Navy (Rec. 38). Under this cable the Secretary "suspends mandatory provisions Art. 1510 Navy Regulations including percentage charges upon commanding officers". When this cable is considered in connection with that to which it was a reply, sent by the plaintiff's ultimate superior, Admiral Knapp, to the Secretary of the Navy (Rec. 38), it is, as Judge Hand says, impossible to read it in any other way than as meaning that the officer eventually designated to do so, should carry the gold and receive no commission (Rec. 15). Thus the plaintiff received from Admiral Knapp, prior to his taking the gold on board, a cable from the Secretary of the Navy which directed the plaintiff to take the gold without charging a commission. Plaintiff was a naval officer and as such, subject to the orders of his superiors, to whom he owed the strictest

obedience. The facts show that Secretary Daniels, next in rank to the President himself, *ordered* that the gold be transported, that Captain Greenslade *ordered* plaintiff to take the gold on board the *Laub* and take it to New York, and that Admiral Bristol, by formal movement order No. 46 in evidence, *ordered* the same thing. The plaintiff had no choice as to taking the gold on board. He might object to the suspension of the article, he might object to the release Galbraith gave him, he might claim his percentage, but he *had* to take the gold on board. He had no choice, no discretion. He was absolutely obligated, as a naval officer, to do that, because he had been ordered to.

It is idle for the plaintiff to make any contention on this head. He made a voyage from Constantinople to New York with a government vessel, carrying as a passenger the defendant's agent Galbraith (Rec. 40, 41). His only justification for the voyage would lie in the fact that he had been ordered to make it. He could not, indeed, found his suit on an illegal act on his own part; and so he is the last one who should deny that he had orders to make the voyage.

That an officer must obey orders seems axiomatic, and it has been recognized by the courts of common law as well as in the service.

> "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other."
>
> *In re Grimley* (137 U. S. 147, 153).

The suggestion will not avail that the Secretary of the Navy could not order the plaintiff to carry the gold. The Statute which he invokes forbids commanding officers to take on board any goods except gold, silver, or jewels, without authority from the President or the Secretary of the Navy. This is far from saying that the President or the Secretary cannot order such a commander to transport other goods or to transport gold, silver, or jewels. The President and Secretary of the Navy are the supreme commanders of the naval forces, and as such they can order their subordinates to do any lawful acts. This is axiomatic. They possibly might not order such transportation for a purely private individual, but it cannot be disputed that they could order ships of the Navy to transport Army Supplies or gold for the Quartermaster's Corps. Similarly, in view of the nature of the defendant, they can order vessels of the Navy to transport its property, for as is shown later, the defendant is in the nature of a governmental agency, even if not part of the government in the sense that it could not be sued; and the Presidential orders of August 10, 1917 (Rec. 43), and of August 14, 1917, expressly provide that all agencies of the government shall co-operate with the Food Administration in order to avoid "duplication of effort and expenditure of funds".

It next might be suggested that any suspension of the regulation by the Secretary was of no effect, this involving the concession that the Secretary could order the transportation. But our contention is that the order to transport was sufficient to prevent the right of the plaintiff to compensation, regardless of the question as to whether or not the suspension was valid.

The regulation allowing the officer to charge the percentage was clearly never intended to cover a case of this kind. The regulation has been analyzed by this Court in *Cartas* v. *The United States* (250 U. S. 545). There the court speaks of the officer possessing "a wide discretion * * * concerning the receipt on board, for the protection of private rights, of gold, silver and jewels". If this discretion lies at the basis of the regulation, what the regulation has in mind is where an officer has it within his power to say, "I will" or to say "I will not" receive the gold. If he wants to receive it, the regulation permits him to receive it, and to make something on the side, just as the captain of the Nantucket boat was allowed to do in *Citizens Bank* v. *Steamboat Co.* (2 Story, 16, Fed Case No. 2730), and just as the Court of Claims pointed out in its decision in the *Cartas* case (which was later affirmed by this Court as above cited) that another statute of this country allows a mail carrier to carry articles for private persons along his route and to charge them something for it (*Cartas* v. *U. S.*, 48 Ct. Cl. 161). In other words, the case which the regulation covers is a case where the officer's only orders are for a voyage to a certain point, but the orders do not tell him to do anything but make the voyage. He is *bound* only to make the voyage. He is not bound to take somebody's gold for him, and consequently he is a free agent to contract for the gold. But in the present case, the *orders* were for the officer *to take this gold on board* and to proceed to New York with it, carrying Galbraith as supercargo. He had no option in the matter whatsoever, and the directions of the Secretary of the Navy about waiving the percentage were really unnecessary.

A carrier is often said to be bound to carry the public's goods. But if it refuses to carry them, it lays itself open to a civil action in tort, for a breach of duty. It can refuse, however. This case is quite different. If the plaintiff had had any discretion in the matter, and had exercised it and refused to take the gold on board, he, as a naval officer, would have been guilty of disobeying the orders of his superior officers. There being no such discretion in the plaintiff, the question reduces itself to the point as to whether, having taken the gold on board, the permission which usually existed to charge for such carriage was still extended to this plaintiff. It is clear that this permission was not so extended. His superior officer, Secretary Daniels, had suspended the permission, and the plaintiff was fully aware of it when he took the gold on board.

It next may be suggested that the Secretary's cablegram merely *authorized* the suspension of the Regulation. But it went further than this. The original cablegram of Admiral Knapp asked if the Department would "direct that shipment be received for transportation as desired" (Rec. 38). The reply of the Secretary approved the Admiral's cable (Rec. 38) and therefore itself "directed the transportation". This is clearly in the form of an order to the commander of whatever ship should be designated. Reading this cablegram with Admiral Bristol's "authorization" to receive the gold on board, there can be no question but that the plaintiff was obligated to take the gold to New York on his destroyer. He did not dispute this; and, if the Secretary's order was as invalid as has been contended, it stands to reason that the plaintiff would have refused to make the voyage with the gold on board, in the light of the defendant's

flat statement that it would not pay for the transportation.

That the plaintiff construed his orders in the same way that we do, and knew that he was absolutely bound to take on board and deliver the gold, is shown by the fact that he neither demanded the freight in advance nor retained the gold after arrival until freight was paid. The regulation which he invokes says that in case of a shipment "the usual percentage shall be demanded from the shipper". This is exactly in line with the right of a carrier or warehouseman to demand freight or storage money in advance (*Little Rock Ry.* v. *St. Louis Ry.*, 63 Fed. 775). Furthermore, a bailee for hire has a lien on the goods for his hire. If the plaintiff had felt that he was right in his position, and that he had no order to take the gold to New York *gratis*, he should have refused to take the gold unless he was paid on the spot, and anyhow he could, at the end of the voyage, retain the gold under the possessory lien which, if he were right in his contention, he would have until the freight was paid. He did nothing of the sort, but on the contrary delivered the gold to the defendant, accompanied only by a repetition of his demand for money. If the position which his counsel now maintains had ever appealed to him, trained in the spirit of the service and with the understanding of orders which one who has reached the grade of Lieutenant Commander must have, he would never have taken the gold on board; or in any event, he would have stood on his rights and retained the gold under his lien.

Some point may be made with regard to Admiral Bristol's movement order No. 46 containing a reference to the regulation under which the plaintiff claims, and asserting that he (Bristol) assumed

responsibility. But Admiral Bristol himself had no option or power to change the effect of the Secretary's order. Bristol's superior was Admiral Knapp, and Admiral Knapp had communicated with the Secretary, his own superior, and had received the instructions for the gold to be put on board a naval vessel and carried to New York. Admiral Bristol's function under this order was merely to designate the vessel, and he could neither add to nor take from the terms of the order. The plaintiff's superior could give him no further or different orders than those which he had received from his immediate superior, and so on upward to the source of the order. Nor may the plaintiff claim ignorance of the fact that Admiral Bristol himself had received explicit orders, because, at the moment when the gold came alongside, the plaintiff had already been advised of the order which had come down to Admiral Bristol from the Secretary of the Navy. Further, it is to be observed that Admiral Bristol so far recognized the obligations of his office as to attach to his movement order the telegram of the Secretary of the Navy; and this once more apprised the plaintiff of the extent to which Bristol could go, and of the value of the Admiral's reference to the Navy regulation. The plaintiff's argument, indeed, may immediately be reduced to absurdity by the observation that, if he were bound only by the orders of his immediate superior, his immediate superior was Captain Greenslade, who explicitly advised the plaintiff of the substance of the Secretary's cable, but did not make any reference to the regulations, or to any rights which the plaintiff might have (Rec. 35).

Plaintiff cannot insist upon any informalities in the defendant's performance of the conditions prescribed by the Secretary's order.

We have shown that the Secretary's telegram prevented any contract arising in this case. But the Circuit Court of Appeals says in connection with its view as to the Secretary's action (Point IV, *supra*) that the Secretary's order cannot operate in this way because the defendant did not comply with its conditions (Rec. 69).

The release which Major Galbraith tendered to the plaintiff was signed by him as "Officer in Charge, U. S. Food Administration" (Rec. 38). No question as to Major Galbraith's actual agency for the defendant can be raised, as it has been shown by the testimony of Mr. Flesh, the Vice-President of the defendant, that Galbraith was appointed agent of the defendant (Rec. 20, 21). Admiral Bristol, the plaintiff's superior officer, recognized Galbraith's agency for the defendant by designating the plaintiff's ship for the voyage on Galbraith's request (Rec. 40). Galbraith accompanied the gold on board plaintiff's ship (Rec. 36, 37); the movement order which was given to the plaintiff had the Secretary's cable attached (Rec. 37) and plaintiff, pursuant to his orders, carried Galbraith to New York along with the gold (Rec. 40, 41) which Bristol had been informed by Galbraith (Rec. 40) and which he in turn informed the plaintiff (Rec. 39, 40) was the defendant's property. The verdict, in favor of which every inference is to be taken from the evidence, is amply sustained by the direct result of the evidence herein. As a matter of fact, the Food Administration and the Food Administration Grain Corporation were terms which were used interchangeably, and signature as one or as the other

were all considered to be the same thing, this starting with the first application for the order and continuing throughout the correspondence (Rec. 38, 39, 42).

Judge Hand is sustained by all of the record when he says

> "That Major Galbraith had full power locally is established by uncontradicted proof, and the Secretary can hardly have meant by his order more than a release by the local officers. He certainly did not expect the release to be executed in the United States or even that it should go to London" (Rec. 16).

But even if the plaintiff had technically a right to insist that the release should be signed in the exact name of the defendant, nevertheless he failed to raise such objection at the time, and thereby he waived any rights to raise this point now. The plaintiff's refusal to accept the release was not based on the ground that it was not executed by the proper officers of the defendant, nor that it was not signed correctly, but on the ground that he was entitled to his compensation, and that the Secretary had no right to suspend the regulation authorizing him to charge such percentage (Rec. 40). If an objection of this sort had been in the plaintiff's mind at the time, all he need to have done would have been to have objected to the form of Galbraith's signature, and this omission could have been corrected on the spot. But the plaintiff raised no such objection. He stood by, received this release, read it and returned it to Galbraith with his communication, which is also in evidence (Rec. 36, 37) without objecting in any way to the authority of Major Galbraith to give the release in the form in which it was prepared. It would seem that

these facts constitute a waiver of any technical objections that the plaintiff might have upon these grounds. In the words of Cardozo, *J.*, "when a word could have clarified his meaning, he did not choose to utter it" (*Title Guaranty, etc., Co.* v. *Pam*, 232 N. Y. 441, 450).

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold* v. *Banks*, 8 Wend. (N. Y.) 562; *Holbrook* v. *White*, 24 *id.* 169; *Everett* v. *Saltus*, 15 *id.* 474; *Wright* v. *Reed*, 3 Durnf. & E. 554; *Duffy* v. *O'Donovan*, 46 N. Y. 223; *Winter* v. *Coit*, 7 *id.* 288. The judge below committed no error in refusing to charge as requested upon this subject."
>
> *Railway Company* v. *McCarthy* (96 U. S. 258, 267).

> "However, as the defendant gave, as the only ground for refusal to furnish the tonnage, the chaotic state of affairs in Mexico we think that it could not, after suit brought, defend on the ground that the contract was not a requirement contract, but a wish, will, or want contract. *Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693; *Luckenbach Co.* v. *Grace & Co.*, 267 Fed. 676."
>
> *Grimwood* v. *Munson S. S. Line* (273 Fed. 166, 168).

> "This principle has been applied in the following instances: *Davis* v. *Wakelee*, 156 U. S. 690, 15 Sup. Ct. 555, 39 L. Ed. 578, where a bankrupt obtained his discharge, claiming that the judgment against him was not affected by it, it was held he could not, in a subsequent

action on the judgment, deny its validity. In *Davis, etc., Company* v. *Dix* (C. C.), 64 Fed. 411, where it was held that the purchasers of a creamery repudiating the contract on the ground of fraudulent representations, could not thereafter set up an interpolation in the contract. In *Harriman* v. *Meyer*, 45 Ark. 40, where it was held that the defense that a tender was not made in ready money was not admissible where the prior objection was to inadequacy of price. In *Wallace* v. *Minneapolis, etc., Elevator Company*, 37 Minn. 465, 35 N. W. 269, where it was held that a bailee refusing to deliver wheat because claimed by another, could not afterwards refuse on the ground that the charges were not paid. In *Harris* v. *Chipman*, 9 Utah, 105, 33 Pac. 243, where it was held that a plaintiff rejecting title for want of administrator's bond, could not be heard to object afterwards that letters of administration were not under seal. In *Ballou* v. *Sherwood*, 32 Neb. 689, 49 N. W. 796 [50 N. W. 1131], where it was held that title objected to because of pending litigation, the purchaser could not afterwards object for want of seal on the deed. In *Frenzer* v. *Dufrene*, 58 Neb. 436, 78 N. W. 720, where it was held that, where a party alleged his wife's recalcitrance as a reason for not executing a contract, he could not afterwards be heard to allege other reasons."

Kansas, &c., Ins. Co. v. *Burman* (141 Fed. 835, 842).

Assuming that the Secretary of the Navy when he sent his cablegram, believed that the gold was the property of the American Relief Administration and not of the defendant, the plaintiff when he took the gold on board was not under any such misapprehension, nor was Admiral Bristol when he issued Movement Order No. 46.

Judge Hand is therefore eminently correct when he says:

> "Had he raised the defect of form it could at once have been corrected; by placing his refusal upon other grounds he prevented the correction of the error, if it was an error, and he waived it" (Rec. 16).

As we have previously pointed out the defendant in this case worked in conjunction with the American Relief Administration in the handling of commodities in relief (Rec. 20). The activities of the Relief Administration and of the defendant were so much the same and were so intermingled that the work of one was often supposed to be that of the other, and *vice versa*. It is true that Admiral Knapp's cablegram to the Secretary (Rec. 38). speaks of the Relief Administration desiring to ship gold from Constantinople to the United States and that the Secretary in suspending the provisions of Art. 1510 referred to this cablegram of Admiral Knapp's (Rec. 38). But assuming merely for the purposes of argument that the Secretary of the Navy himself misunderstood the facts and that the suspension of the article for which he provided in his telegram was for the benefit of the Relief Administration, nevertheless the fact that the gold was the property of the defendant and not of the Relief Administration was known both to the plaintiff and to Admiral Bristol, his superior. Movement Order No. 46 (Rec. 39, 40) which was issued on September 15, 1919, by Admiral Bristol expressly states, "This gold is the property of the United States Food Administration (Grain Corporation)". The release which Major Galbraith tendered to the plaintiff (Rec. 38) was signed by him as "Officer in charge, United States Food Administration",

and not as one signing in behalf of the Relief Administration. If either Admiral Bristol or the plaintiff had believed at the time that the Secretary of the Navy did not intend to suspend the provisions of Art. 1510 in behalf of the defendant or to order the transportation of this particular gold, it is reasonable to assume that when the defendant and not the Relief Administration started to ship the gold, the Admiral and the plaintiff would have totally disregarded the Secretary's telegram which was attached to the orders. But they did not do this. Everything which they did clearly shows that they were acting on the supposition that, whatever the wording of the Secretary's telegram might have been, what was intended thereby was that the gold about to be shipped by the defendant was that mentioned in the cablegram. As has been pointed out above, if either Admiral Bristol or the plaintiff thought that the Secretary of the Navy was without power to suspend the regulation, it seems reasonable to suppose that the plaintiff at least would have refused to have taken the gold on board and transport it to New York in view of the fact that the defendant, clearly and definitely informed the plaintiff that it had no intention of paying for such transportation. Even more would the plaintiff have refused to have taken the gold on board, had he felt or been convinced that the Secretary in his cable intended to suspend the provisions of the article for a party other than the owner of the gold which was about to ship the same on board the *Laub*.

It may be suggested that the release tendered by Major Galbraith did not release the plaintiff from *all* responsibility and therefore did not comply with the Secretary's cablegram. The release excluded "responsibility except such as is usually incumbent

for care of public property" (Rec. 38). This was in exact accordance with the Secretary's order, for Admiral Knapp's cable to him uses those very words (Rec. 38) and the Secretary's reply speaks of the release "as per your mission 555" (Knapp's cable, Rec. 38).

Entirely apart from the validity of the plaintiff's orders or the Secretary's action, the fact remains that no contract was made in this case; all the facts showing an intent on the defendant's part, plainly conveyed to the plaintiff at the time when the gold went on board, not to pay him anything.

The contract to pay freight to a common carrier comes from the mere fact that the consignor takes the goods to the carrier's terminal and delivers them to him. The consignor knows the character of the person with whom he is dealing and knows that he takes people's goods only for hire; and therefore the contract of affreightment arises from the mere fact that the goods are delivered to the carrier.

But in the present case the plaintiff is not a common carrier. At most he is like the captain or purser of a vessel like that owned by the Nantucket Line in the case which we have heretofore cited. To entitle him to demand money from somebody else for taking that person's goods into his custody, something more must be found than the mere fact that the goods went into his custody.

But in the present transaction there was never any agreement to pay freight, but on the contrary, a distinct disavowal by the defendant of any intention to pay the plaintiff anything. Before the goods were put on board the plaintiff was shown by his superior a cable from the Secretary of the Navy,

sent at the instance of the defendant, suspending the regulations and directing that the officer do not charge anything. The defendant's agent came on board with the gold and again called the plaintiff's attention to the cable message, and furthermore offered the plaintiff a release in compliance with its terms. All of this was tantamount to saying to the plaintiff, "We are not going to pay you a cent on account of this gold being carried." The plaintiff's only logical position should have been "Very well then, your gold will not be carried." If, as his counsel now contends, he was under no obligation to carry the gold unless he was paid, he could not have been court martialled for taking that position. That undoubtedly is the position that a common carrier would take if a consignor, bringing goods to the terminal, clearly says, "You must take them free because I am not going to pay you for it." On such a notice being given to the carrier, the goods would not be received.

Yet the plaintiff took the goods. He took them because he was by no means as sure as his counsel now profess themselves to be, that he was not under obligation to take them free of charge through the orders of his superior.

But it was of no concern to the defendant why the plaintiff took the goods. The fact is that the plaintiff took them with the distinct understanding from the defendant that the latter was not going to pay him anything for it. These facts utterly negative an express contract, and they negative an implied contract. As the plaintiff does not claim that his claim is in *quasi* contract, it is unnecessary to discuss whether there can be any equity in per-

forming services for a man who distinctly tells you he is not going to pay you for them.

> "There may be cases where the law will imply a promise to pay by a party who protests he will not pay; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. * * * If a man absolutely refuses to furnish food and clothing to his wife or minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force imply a promise against his protestations. But such promise will never be implied against his protest except in cases where the law itself imposes a duty; and this duty must be a legal duty."
>
> *Earl* v. *Coburn* (130 Mass. 596, 598).

As to the bill of lading:—The fact that the plaintiff issued a bill of lading for the gold cannot help his case.

The very form in which it was issued shows, if anything, that he signed the same in a representative capacity. The complaint alleges (Par. XI) that "*as commanding officer*" the plaintiff signed the bill of lading (Rec. 5); and this stands as a fact, for the answer does not deny it, and the evidence is silent. That being the case, he cannot be heard to say that the defendant contracted with him. The responsibility, if any existed after the giving of the release, was the plaintiff's individual responsibility, not the government's, and as has been pointed out, that is why the regulation ordinarily allows the officer his percentage. The *Cartas* case, heretofore cited (*Cartas* v. *U. S.*, 250 U. S. 545) has as the main

point of its decision, the proposition that *the liability and responsibility in such a case are the officer's, not the government's.* The regulation merely states that "the commanding officer shall sign bills of lading"—it merely identifies him. But *here he did not sign individually, showing that he received it and would be responsible, but "as commanding officer"—in other words, in his official capacity and not an an individual. It therefore seems that he cannot claim that a contract was made with him individually by reason of the bill of lading. The complaint indicates nothing of the sort.*

In any event, the fact that the bill of lading was given, as alleged in the complaint, is of no importance. In the first place the complaint does not allege that it was a negotiable bill; and therefore no matter into whose hands it might pass, it stood, according to well settled principles, merely as a receipt and open to any explanation that either party might have to offer. The defendant needed some sort of bill of lading because the Secretary's telegram required that the gold be insured. The production of some sort of receipt would be necessary in case of a loss in insurance on adjustment. But the plaintiff well protected himself against any subrogation by the insurer by signing the bill of lading as commanding officer of the vessel and not individually.

Counsel made much of the risk which he claims that the plaintiff assumed of being liable as a common carrier. As a matter of fact, no such risk could be considered to have been assumed. In the first place the plaintiff issued a bill of lading only "as commanding officer" (Rec. 5); and second, the vessel on which the goods were shipped was a war vessel, and was not engaged in the transportation of goods for hire. Even in the

case of a merchant vessel which is not engaged in the business of carrying valuables, a delivery of gold to the captain would simply be a bailment to him. The owner of the vessel would not be liable as a carrier under those circumstances, and the captain could not be held to a carrier's responsibility, for he himself was not a common carrier. Such is the reasoning of Mr. Justice Story in *Citizens Bank* v. *Nantucket Steamboat Co.* (2 Story, 16, Fed. Cas. No. 2730) to which we have elsewhere referred.

We have now concluded our argument that the plaintiff cannot recover except by virtue of the statute and regulation (in turn enacted pursuant to statute) themselves, because he has no contract express or implied. He recognized this by framing his complaint solely on the basis of the statute and regulation, and by stating in his brief below that his suit rested on these as binding the defendant entirely apart from any question of contract (see Point I, supra). There is indeed no dispute between the courts below as to that proposition. Judge Hand took the trouble to demonstrate that there is no contract relation, but the Circuit Court of Appeals does not even take time to discuss the matter, resting its opinion solely on the proposition that the defendant is bound by the statute to pay the plaintiff, and that indeed anybody who puts gold on board a war vessel is obligated, by virtue of the statute, and the regulation enacted pursuant to the statute, to pay freight to the officer whether he wants to or not and whether he says that he intends to pay it or not. On this question, and those which arise from its discussion as presented in the points that follow, we will contend, in the ensuing points, that the Circuit Court of Appeals is in error and that Judge Hand was right.

VI.

Neither the statute nor the regulation binds the defendant: they are disciplinary in their nature and apply only to persons who are members of the naval forces.

Upon what matters of statute does the plaintiff rely?

First is Article 13, Section 1624, of the Revised Statutes of United States. This is one of the "Articles for the Government of the Navy", and the opening paragraph of these articles reads as follows:

> "The navy of the United States shall be governed by the following articles."

Then follow various provisions, which, generally speaking, are similar to the Articles of War governing the army, and which set forth various naval offenses and the punishments therefor. They may be said to constitute the naval criminal code. Article 13 provides as follows:

> "Such punishment as a court martial may direct may be inflicted on any person in the Navy who * * * (13) * * * takes, receives or permits to be received on board the vessel to which he is attached, any goods or merchandise, for freight, sale or traffic, except gold, silver or jewels for freight or safe-keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels without authority from the President or the Secretary of the Navy."

The second thing to which the plaintiff points is a Navy Regulation (Section 1510) which provides that for carrying gold, the commanding officer of the ship may charge a certain rate. Here, through the Regulations of the Navy, promulgated by the Secretary of the Navy, we have an administrative, as contrasted with a statutory, permission given to the officer to make a certain charge if he carries gold.

The statute makes it a military offense for the officer to carry anything but gold. The regulation *permits* him to make a charge when he carries gold. The Government gets none of this charge, and all it does is to allow the officer to get it if he can, that is, to bargain for it.

The Circuit Court of Appeals confuses the statute with the regulation. Its theory is that the statute gives the plaintiff the absolute right to get compensation whenever gold is carried. It cites (Rec. p. 67) *Cartas* v. *U. S.* (250 U. S. 545). But in *Cartas* v. *U. S.* the only question was *whether the Government was liable for a loss* in a case where gold was taken on board and the officer had received compensation. In saying that the regulation was an elucidation of the statute, this court was referring to the fact, that the regulation allowed the officer to charge a certain rate of compensation, as showing that the sattute did not impose any obligation, or confer any benefit, upon the United States.

This statute, to repeat, is purely penal. It makes it a military offense for an officer to take anything except gold on board. The regulation simply states what he can charge and how the compensation shall go; *but neither the statute nor the regulation undertakes to say that the officer has anything more than*

the right to charge when he can get somebody to agree to pay him. Neither the statute nor the regulation goes so far as to confer upon the officer a vested right to have compensation whenever gold goes on board a war vessel. It is not so stated in either the statute or the regulation, and no such inference can be drawn from either of them. The regulation, therefore, not being such an interpretation upon the statute, and the statute plainly speaking for itself as merely a penal statute, forbidding the officer taking anything but gold on board, there is nothing to confer upon the officer any vested right to refuse to take gold on board except when he is going to be personally paid for it.

Yet from this premise the court below draws the conclusion that (*a*) the officer having a vested right (*b*) the Secretary cannot take it away from him either by suspending the regulation or by ordering him to take the gold without any compensation (Rec. 68). We have discussed this elsewhere (Point IV, *supra*) but the topic should again be mentioned for this reason—If the statute itself did not confer upon the plaintiff a vested right, then the Secretary could suspend the regulation, and this the court does not deny. If the statute did not confer upon the plaintiff a vested right, then the Secretary could order him to take the gold without compensation, and this the court does not deny. The court's whole argument, therefore, hinges on the proposition that the statute itself,—not the regulation but the statute itself,—gives the plaintiff a vested right *as against the defendant* which could not be taken away from him by any order of the Secretary however it might be construed.

But for the statute to give the plaintiff a vested

right as against third persons, it must be shown that the statute binds them. And this the plaintiff fails to do.

First of all it should be noted that *this statute does not profess to apply to any persons other than officers of the Navy.* It is *a penal statute,* or disciplinary, as you will,—but its application is confined to members of the forces.

In the very nature of things that is so, because such statutes are never intended to apply to any persons except those who, by accepting commissions as officers or enlisting in the ranks, have taken on themselves, in the words of Brewer, *J.*, "a new status, with correlative rights and duties" (*Re Grimley,* 137 U. S. 147, 152). Neither statutes nor regulations relating to either the army or the navy, therefore, of their own force can bind a citizen who is not a member of the forces. All the decisions are based on this fundamental point, and all the cases dealing with the application of such statutes really turn on the question whether the party involved has become subject to these statutes by being a member of the forces. *The civilian, in his dealings with the army and the navy, is protected by the rules of the common law, and disciplinary statutes enacted for the governance of the armed forces do not apply to him.* To the contrary of this fundamental proposition no case has been found, and certainly the Circuit Court of Appeals has cited none. *Smith* v. *Whitney* (116 U. S. 167) deals with whether a naval court martial was properly convened for the trial of one who admittedly was a commissioned officer and therefore subject to the jurisdiction of a court martial and to the application of all statutes concerning the government of the navy. But for authority in our

direction, we need go no further than an opinion rendered by General Devens while Attorney General to the Navy Department on the precise question here involved (16 Op. Att. Gen. 494), and the classic case of *Ex Parte Milligan* (4 Wall. 2).

If the statute on which the plaintiff relies were intended to apply to the world at large, then it is a necessary implication that the other provisions of the statute, not involved in this case, can be invoked against civilians. Both the Articles of the Navy (the Statute in question) and the Articles of War which govern the Army contain penal provisions which punish by court-martial acts prejudicial to discipline and the good name of the respective forces. It is perfectly possible for a civilian to commit such acts, and yet the plaintiff's position is this case would necessarily lead him to say that such a civilian could be brought before a court-martial and punished by it for such acts. Such procedure is, in the very nature of things inconceivable except in time of war and in an actual theatre of war (*Ex Parte Milligan,* 4 Wall. 2).

Finally let us observe that if, as the appellant claims, the statute had had the force of universal law instead of being a mere matter of discipline relating to the officer, then the United States would be responsible if the goods were lost. But that is not the law.

Cartas v. *U. S.* (250 U. S. 545).

Citizens Bank v. *Nantucket, etc., Co.* (2 Story 16, Fed. Cas. No. 2730) and cases there cited.

VII.

The Statute and Regulation are permissive merely; they allow the officer to make a contract, but do not create one for him.

This, we submit, appears from the argument contained in the last preceding point; but, if necessary, direct authority can be adduced in its support.

This Court passed upon the question in *Cartas* v. *U. S.* (250 U. S. 545). In 1869 the plaintiff, being in Havana, placed on board one of our war vessels some gold for safe-keeping during the time that the vessel lay in the harbor. The captain subsequently not accounting for the gold, the plaintiff sued the Government in the Court of Claims. That Court dismissed his suit (*Cartas* v. *U. S.*, 48 Ct. Cl. 161), and this Court affirmed this judgment (*Cartas* v. *U. S.*, 250 U. S. 545). The decision was that in a transaction of this sort, the Government could not be held because there was nothing in the statute to justify any one in binding the Government to the obligation of a carrier or warehouseman. The reasons moving this Court to this conclusion included the fact that, as pointed out by the Chief Justice, *the regulation gives the officer absolute discretion as to whether or not he will take the gold on board.* The statute and regulation, in other words, in the first place *predicate absolutely no liability on the Government*, and they *predicate nothing for the officer unless in his discretion he chooses to take the property on board.* In other words, the Government says, "I am not in the business of transporting merchandise, but the

Captain of one of my vessels can, if he wants to, undertake this private venture, provided his duties as prescribed to him by me in the given case do not take away the room for discretion which otherwise he would have".

Of course if the orders which the officer has are inconsistent with his engaging in a private venture in the particular case, he cannot do so. This proposition is self-apparent. Neither the statute nor the regulation could have been intended to alter the fundamental principles, (*a*) of obedience to orders on the part of an officer, (*b*) that both the vessel and the officer who commands her are dedicated to the purpose of serving the uses of the Government and of obeying any instructions which may be given. The statute and regulation, therefore, can apply only in a case where an officer, having no directions to the contrary, is free to act.

In such a case the officer, not being a common carrier, or public warehouseman, makes a special bargain which his employer has given him permission to make. *But it is a special bargain and must be shown. The mere permission given him by his employer to make a bargain does not indicate that a bargain has been made.* This is the effect of a civil case of the same nature. There the plaintiff turned over some cash to the master of the New Bedford-Nantucket boat to be carried in the boat from Nantucket to New Bedford. The master never accounting for the money, the plaintiff sued the Steamship Company. In holding that the Steamship Company was not liable, Story, *J.*, said:

> "The ground of the defence of the company is, that, in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment;

> that they never were, in fact, common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master, in receiving and transporting money and bank bills, acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the company or by their authority; that, in truth, he acted as a mere gratuitous bailee or mandatory on all such occasions; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the company, but on his own private account, *as matter of agency for the particular bailors, or mandators.*" This defence the learned Judge upheld.
>
> *Citizens Bank* v. *Nantucket Steamboat Co.* (2 Story, 16 Fed. Cas. No. 2730).

This case, in line with earlier ones which it cites, fits in precisely with the *Cartas* case to which we have already referred. In *Cartas* v. *U. S.* (250 U. S. 545), it was held that the intention of the Navy Regulation in question was not to make the Government responsible to the person entrusting gold to the officer, and this Court considered its conclusion fortified by the fact that the Regulation gives the commander a discretion as to whether or not he will take the gold. The master of a war vessel, therefore, is precisely in the position of the master of the Nantucket boat in the case before Justice Story. It is purely a matter of private contract, *actual contract,* between the officer and the shipper. Unless the plaintiff can show such a contract he cannot recover.

The history of similar regulations in the Royal Navy demonstrates the correctness of the view that the charging of freight is not a vested right of the

officer, and is merely a permission given to him. In the Royal Navy, as history shows, from time to time this permission was granted and from time to time it was taken away for the good of the service.

The first reference which we find to it in this matter is in the regulations which were drawn up for the Royal Navy in 1663, in the course of its reorganization.

> "The act of 1661 (13 Car. II. c. 9) 'for the Regulating and better Government of his Majesty's Navies, Ships of War, and forces by sea' was founded directly upon the articles of war of 1652, which were an elaboration of the ordinances passed in 1647 for Warwick's fleet. They are directed mainly at discipline in the fleet, and set forth in detail the powers and limitations of the courts-martial. Though neither original nor novel in its articles this act remained as the basis of naval discipline for a century; it was only repealed by 22 Geo. II. c. 33. The duties of the captain were set forth and regulated by the 'General Instructions to Captains' of 1663, and from them it is possible to gain some idea of the inside of naval life. * * * The two final instructions are of special interest, one because it was rarely kept, the other because it shows us what training in gunnery was considered necessary. *Instruction XXX forbids the captain to take in any merchandise except gold, silver or precious stones;* trading on the part of naval captains was one of the chief of the minor breaches of discipline, and throughout our period this article was far more honoured in the breach than in the observance. Instruction XXIX orders that 'for the first month the men be exercised twice every week to the end that they may become good Fire Men, allowing six Shott to every exercising. That the 2nd month they may be exercised once every week, and after that only once in two months allowing six

shott to each time of exercising.'" (Italics ours.)

Tedder, The Navy of the Restoration, pp. 67, 68.

As will be noted the instructions limited the captains to gold, silver and precious stones. We find, however, in a collection of Pepysiana in the library of Columbia University, a very interesting print entitled "*Pepys Memoires*, Relating to the State of the Royal Navy of England, For Ten Years, Determin'd December, 1688, printed Anno MDCXC." In the course of this document (Appendix B hereof), devoted chiefly to the various disciplinary measures instituted by James II, who, while Duke of York, had been first Lord of the Admiralty, Pepys tells us that the King forbade the commanders even to carry gold, silver or precious stones without Royal warrant. In Hanoverian times, however, the permission seems to have been relaxed and then again restricted, as appears by two reported cases in the English Common Pleas arising during the Napoleonic wars (*Brisbane* v. *Dacres*, 5 Taunt. 144; *Hodgson* v. *Fullarton*, 4 Taunt. 787). In *Brisbane* v. *Dacres* the plaintiff, a captain in the Royal Navy, sued the estate of Admiral Dacres, the late commander on the West Indian station, for money had and received. The plaintiff had transported gold on his vessel and had taken freight therefor, giving the Admiral one-third. It appearing that the permission to officers to carry private gold had been revoked, the plaintiff sued the admiral's estate for the money paid the admiral. It was held that the plaintiff could not recover, Gibbs, *J.*, saying:

"With respect to the freight of private dollars we are all agreed; and as Captain Brisbane had no right to carry those dollars at all, and

> stipulated for and received a freight to which he had no right, and afterwards, in pursuance of an understanding with Admiral Dacres imparted a part to him in manner agreed on; we are all of opinion, that this carrying of the dollars was an illegal transaction, that the whole which followed was tainted with the same illegality, and that the money paid cannot be recovered at all, inasmuch as the Captain could not lawfully employ the ship and crew which ought to be employed in the service of his majesty in carrying bullion for individuals."
>
> *Brisbane* v. *Dacres* (5 Taunt. 144).

In *Hodgson* v. *Fullarton* the question was the liability of a commander of a war vessel who carried the bullion of a private merchant for not safely keeping and delivering it. The real question was whether or not such a carrying by a war vessel infringed a monopoly which had been granted the South Sea Company. This case was decided in 1813, the transportation in question having taken place in 1809. In the argument of counsel it was said:

> 'The practice of sending home the remittances for cargoes of private merchants in King's ships had been universal, and if any doubt were now to be thrown on the legality, it would be necessary that an Act of Parliament should pass for the indemnity of all who had been concerned therein".

The Court said (Gibbs, *J.*):

> "As for bringing home the bullion in his majesty's ship *Cheerly*, it was only doing that which the vessel might lawfully do".
>
> *Hodgson* v. *Fullarton* (4 Taunt. 787).

From the above it appears that the admiralty had been troubled with the abuse of this practice by commanders and admirals, and had issued orders on the subject which apparently had not been fully understood by the service or the courts.

But running through all the history thus sketchily revealed is the fact that any regulation of this sort starts off with the idea of forbidding an officer to engage in any private business at all with a ship of the navy. It is not his ship, he gets his pay for his services, he has no right to engage in private enterprises, and history had revealed the troubles in the shape of lack of discipline brought on the navy by the persistence of officers in such practices. Therefore, these regulations all go to the point of forbidding the officer to engage in private business by the use of the ship under his command as a carrier, except only in special cases carefully defined; and in those cases he is given permission to indulge in something which it is recognized that he has no right to do without such a permission. He is not ordered to engage in the practice, he is not encouraged to engage in it, it is his private venture when he does engage in it, and an undertaking of the sort on his part is a matter solely of permission. In with this history, therefore, fits precisely the decision of this court in *Cartas* v. *U. S.* (*supra*). This Court there held that when an officer does engage in such a private enterprise the Government is not liable for the loss of the private cargo which he has taken on board. Its decision in this regard is exactly in line with the words of Gibbs, *J.*, above quoted, that "the captain cannot lawfully employ the ship and crew which ought to be employed in the service of his majesty in carrying bullion for individuals" (*Brisbane* v.

Dacres, supra). The statute and regulations in the present case are therefore part of the same story. Following the same line as the general instructions issued to the captains in 1663, the statute expressly forbids the officer to carry anything privately except gold, silver or jewels; which means that he shall not use a ship of the United States (to paraphrase the language of Gibbs, *J.*, with regard to using a ship of his majesty) in carrying anything but an article of that class. To that extent he can make a private trading venture; but it is his private venture, the United States is not liable (*Cartas* v. *U. S., supra*) but he is liable (*Hodgson* v. *Fullarton, supra*). The regulation simply provides how much the officer shall charge and provides for the distribution of it when the officer gets it, but all of that is permissive; all of that is a matter of stipulation between the officer and the merchant who chooses to entrust his goods to the officer. Unless, therefore, it appears that, again to use the language of one of the cases above cited, the officer has "stipulated for and received a freight" (*Brisbane* v. *Dacres,* quoted *supra*) he has no case, because he has not made his stipulation.

VIII.

Neither the statute nor the regulation was intended to give the plaintiff even permission to make a charge to a coordinate agency of the Government like the defendant.

In making this contention here, as we made it below, we realize the proposition which finally found sanction in this court's late decision in *Sloan Shipyards Corp.* v. *U. S. Shipping Board Emergency Fleet Corp.* (42 Sup. Ct. 386).

Our contention, however, is not inconsistent with this decision. We do not claim that this defendant is the Government, or that it is immune from suit. All we say is that, in construing the statute and regulation involved in this case, which as we have seen, give only a permission to an officer to make a charge, regard should be had as to the sort of person with whom the officer proposes to trade, as ascertaining whether it was intended to give him permission to make the trade with that sort of person at all.

The Circuit Court of Appeals states that the Government is "the principal stockholder" of the defendant (Rec. 65, 70),—to be precise, the Government is the sole stockholder in the essence of things (Rec. 27),—refers to its organization (Rec. 66), and then says that the defendant "is not a governmental agency". The Government, it says in the next sentence, "created this agency, but the corporate responsibility is that of a private corporation" (Rec. 70).

We submit that this does not meet our contention.

The term "governmental agency" may mean much or little,—one may be acting by color of his agency and yet be liable,—and so with the term "private corporation". A bank, in one sense, may be a private corporation, and yet it stands off to itself, in many States, in regard to the application of such common law rules as may relate to the doctrine of *ultra vires* and the like (*Gause* v. *Commonwealth Trust Co.*, 196 N. Y. 134). What we have to present here, as we presented it below, relates to the defendant's corporate character and history only insofar as it may relate to construing the statute and regulation on which the plaintiff's case rests.

The defendant was created under the laws of the State of Delaware pursuant to an executive order of the President issued under the authority of the Food Control Act of August 10, 1917. Its entire capital stock was and is owned by the Government, and its officers and directors have been selected with the consent and approval of the President. It has been the subject of many executive orders issued by the President.

The purpose of its organization is manifest. At the beginning of the war it was found necessary and advisable to conserve the food supplies of this country, and to regulate and administer their distribution both in this country and to the nations of Europe, so that prices would remain stable and war speculation in essential foods would be checked. With this all in view, the Food Administration was created and Mr. Hoover was appointed Food Administrator. In order to carry out the manifold activities which the Food Administration had to undertake, a corporate form of organization for dealing with grains was found advisable. The de-

fendant was therefore organized under the laws of the State of Delaware in order to simplify the tremendous task which the Food Administration found upon its hands. The purpose of the whole scheme was a war purpose, pure and simple. In order to assist in winning the war, the government, in a sense, went into the food business, and the way in which it did this was through the Food Administration, and its agency was the Grain Corporation. The Grain Corporation, it is true, was run at a profit, but to whom did the profit belong? To the United States Government, for the latter was its sole stockholder, and any income which the Grain Corporation received would ultimately enure to the profit of the United States and the United States only. In this very real sense, the defendant was part of the government. It was one of the manifold activities created for war purposes and it acted under the direction and control of the government through the President and his duly authorized representatives.

Of course, being in commercial business on a tremendous scale, it naturally had many of the attributes of a business corporation. It made commercial contracts and, if the parties with whom such contracts were made did not perform them, it held them to performance, resorting to legal proceedings, if necessary. On the other hand, if it did not perform its commercial obligations, it expected to be held liable, to meet its obligations and to perform its contracts as any other private business corporation would do. It was and is, therefore, a business corporation in that sense.

But with regard to the present case, it is necessary to analyze its purposes, the way in which it was created and the nature of its organization.

Through this analysis, we can see that it was a part of the government, although in this particular instance the government was really in business.

An analogy may be drawn with the post-office department. Historically, the activities of the post-office were originally private. Private individuals undertook the delivery of letters and packages for a given compensation, and their work was in no sense a governmental function. It was a simple commercial business conducted by private individuals. But the necessity of the case and the lack of uniformity in different parts of the country led our government, in common with those of all the other civilized nations, to go into the post-office business for the public benefit. It was a matter that so widely affected the public that it was inadvisable to leave the delivery of mail in the hands of private individuals, competing and working at cross purposes. Therefore, the government took this business over and coordinated the work which had previously been done privately. In a similar way and under the pressure of war necessity, the government went into the grain business, a business under ordinary circumstances conducted by private individuals, each following his own ideas as to how the business should be managed and how he could best make a profit, each one competing with the other and with no coordination between them. This business, the government took over during the war much as it took over the post-office business permanently. In conducting this new business, the government used the Grain Corporation as its agency, and it continued to use it as such when it set up the Relief Administration after the Armistice and directed that the defendant should be an agent of that organization.

When the regulation entitling the commanding officer of a ship to charge a percentage was promul-

gated, it would seem that the intention was to allow the officer, in a sense, to do a little business on the side. True, he was in command of a naval vessel, his employer was the United States Government, he took his vessel where he was directed and not according to his own wishes or desires or for his own benefit. But the Navy Department said to him, in effect, "In carrying out our orders and in using the government's vessels, we will allow you to transport gold for private individuals *if you assume the responsibility*, and you may charge the persons for whom you transport it a certain percentage." As has been pointed out above, the commanding officer must have discretion as to whether or not he should take the gold. If, having discretion and not orders, he decided that the risk was too great or that he did not care to assume the responsibility, he was not compelled to take the gold on board. If he decided that he was willing to assume the responsibility, he might take the gold on board and then the Navy Department said that he could obtain compensation for so doing. The analogy which has been pointed out in the *Cartas* case holds good here also. The rural mail carrier is a government employee. He carries mail for the government and has no discretion as to whether he shall carry it or not and deliver it to the parties for whom it is intended. If a private individual requests him in going his rounds to deliver a package for him, he is permitted to do so and to charge for his service, provided of course that it does not interfere with his primary duty to the government as a mail carrier.

But here the case is altogether different. As has been pointed out, the government is in business through the defendant. The defendant was a governmental agency in one line, just as much as the

Navy was a governmental agency in another line. We, therefore, have the case of one department of the government dealing with another department. If the Navy Department carries gold for a private individual, the private individual should pay the officer under the regulation provided he contracts so to do, and also provided the naval officer in question is not under orders to carry it. (And such orders for the benefit of a private individual would seem to be illegal.) But if the gold which is carried is the property of another department of the government and not of a private individual, it is absurd to say that it was intended that compensation should be paid the officer in this particular case. It is as though the rural mail carrier, referred to above, carried governmental property from one point on his route to another for an army officer in connection with his duties.

The very act under which the Food Administration was created, and the various executive orders all speak of the avoidance of "duplication of effort or funds". If such avoidance was one of the purposes for which the organization was formed, it clearly is not being accomplished by allowing the plaintiff to charge for transportation in this case. In fact, it is, we submit, not going too far to say that the plaintiff and the entire Navy were by the force of these executive orders, specifically ordered, by competent authority, to perform such a service for the defendant, gratis.

Furthermore, as we have already pointed out, the plaintiff here had no discretion as to whether he should carry the gold or not. He could not say, "The risk is too great; I will not assume the responsibility and will therefore not take the gold on board." He was ordered and directed and he could not refuse to do so. If the compensation

allowed him by the regulation was intended to cover the additional responsibility which such transportation placed on his shoulders, this would not seem to be the case here. There was no such responsibility, for he had been released therefrom. His own complaint asserts that "*as commanding officer*" he issued a bill of lading, not personally (Rec. 5).

But even if he had not been released, we contend that in view of the nature of the defendant, it was never intended nor contemplated that a charge should be made by the Navy Department or any of its personnel for doing work of this sort for another governmental agency.

Even though the defendant is a business corporation conducted for a profit, that profit belongs solely to the government and it should not be compelled to pay compensation to another department of the government for assisting it in the performance of its necessary functions.

Furthermore, even if no directions whatsoever had been given to the officer, and he had no specific directions to carry the gold in question, yet the regulation obviously was not intended to cover the case of gold in which the government had the sole interest. If it were, the appropriate provision would have appeared in the portion of the statutes covering pay. The officer's pay is the equivalent of the service he renders the government for all things appertaining to the government. It may be that taking this lot of gold on board increased the officer's responsibility, but from a legal point of view, his responsibility is no more increased because it is gold, or because it might have been quartermaster's stores or what not. The point is, that for all things which he does for the government or with respect to government affairs, his

compensation is his pay. This is why the pay statutes provide for a sliding scale for sea service, and for foreign or domestic service, but all those things are grouped under the head of pay.

Again to quote from the New Jersey case:

> "It was apparent that the salary or remuneration incident to a public office, as a rule, was essential to a decent and comfortable support of the incumbent. If the officer should be deprived of his support, there would arise a hazard of his being driven to an inappropriate means of living, of his being harrassed by the worry of straitened circumstances, *and tempted to engage in unofficial labor*, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive." (Italics ours.)
>
> *Schwenka* v. *Wyckoff* (46 N. J. Eq. 560; 9 L. R. A. 221).

The Navy Regulation under discussion, generally speaking, was intended to cover a case of such "unofficial labor" and to authorize the officer to get compensation for undertaking it. But here it was not "unofficial labor". It was official, done for a concern owned by the Government.

The present regulation applies to an officer taking gold on board and has no connection with the statutes relating to pay. Obviously it is intended for the officer and his relationship, not with the government or *anything savoring of the government, but with people having nothing to do with the Government at all.* Could it be contended that this officer could have exacted pay if a special messenger of the War Department carrying gold for something in connection with the Quartermaster's operation in Europe during the war had stepped on board the ship? The officer would cer-

tainly have wanted to put the gold in the strong room, and the responsibility of the officer of the ship would increase just as it has increased here when this gold was put on board. But the point of the matter is, who is the person putting the gold on board? The question is whether or not he is connected with the government service, and whether or not the object of the gold is for something for the benefit of the government. And when we learn, as in the present case, that every share of stock of the corporation is owned by the government, nothing can be done by this corporation that is not for the government. Maybe the government ought not to do certain things, but nevertheless the government has done them, and this statute is not intended for any such purpose.

This does not embrace the contention that this corporation is not suable or that it should not respond in a court of law to any engagement which it entered into. The question here is whether the officer could enter into any engagement of the sort he claims.

Finally it is to be observed that the fact that this corporation made money has no bearing on its exercising governmental functions. This corporation, by endeavoring during the strain and stress of the war to save something for the hard-pressed treasury of the government, was reverting to older ideas; such ideas as Salmon P. Chase had as Secretary of the Treasury in Lincoln's cabinet when he invented the policy of charging licenses to persons for the privilege of buying cotton from the Confederates. This Court on two occasions upheld these licenses, although it noted the fact that the fees Secretary Chase had charged were high (*The Reform,* 3 Wall. 617; *Hamilton* v. *Dillon,* 21 Wall. 73).

Any contention that the defendant had no authority to deal with Bulgaria comes too late. Assuming that the Relief Administration had no statutory or executive authority to supply Bulgaria or to use the defendant in this matter, the fact remains that all hands understood differently at the time. All hands, we say,—not only Mr. Hoover and the defendant, but Admirals Knapp and Bristol, the Secretary of the Navy, and even Captain Greenslade, the plaintiff's immediate superior, thought that the matter in hand was one within the lawful powers of the Relief Administration and its agent the defendant. If not, every one of the naval hierarchy involved would be defenseless before a court martial. For not only was the gold carried on a government vessel under orders and a suspended regulation, but the like orders included a direction to carry home the defendant's agent, Major Galbraith, as a passenger, and these orders the plaintiff obeyed (Rec. 40, 41). Passengers cannot be transported by naval vessels, unless they are on government service. The plaintiff, having obeyed these orders, is hardly in a potion to question their authority.

But in any event, as Judge Hand pointed out, it was immaterial to the plaintiff and his naval superiors how the defendant got the gold. The fact was that the defendant had it, that the defendant was ordered by the government, and that the government was the sole party in interest with respect to the gold. No matter how the gold had been obtained, it was lawful at least to take it to where it now belonged, to the United States. Orders to that end were therefore lawful orders.

IX.

Even if the Regulation was mandatory and applicable to the defendant, it could not operate because it had been duly suspended as shown in Point IV hereof.

X.

The judgment of the Circuit Court of Appeals should be reversed, and the judgment of the District Court restored.

Dated December 21, 1922.

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for Plaintiff in Error,
42 Broadway,
New York, N. Y.

APPENDIX A.

Rulings of Judge Advocate General of Navy Referred to in Brief.

"91. Same. The records of the department show that for a great many years precedents have existed and been followed, amounting practically to a custom on the part of the Secretary of the Navy to waive provisions of the Navy Regulations in individual cases, where such action for any reason seemed advisable. The exercise of such power by the Secretary of the Navy was sustained by the Comptroller of the Treasury in a decision rendered January 8, 1900, in which it was said: 'I know of no law or rule which forbids the head of a department from suspending the operation of any regulation similar to this in individual instances. The effect of such suspension is to cause a want of uniformity in the operation of these regulation, but if this be a fault, it is chargeable to the administration of the regulations, and does not imply the want of power to so suspend the operation of a regulation in individual cases.' In the case considered by the Comptroller it appears from his decision that the *Secretary of the Navy* directed that the operation of the regulation in question be suspended; and the comptroller stated that such regulation 'was waived by the power which made these regulations'. This last statement was literally true, as at that time Navy Regulations and changes therein were not expressly approved by the President, but the entire matter of making, modifying, repealing, and suspending or waiving Navy Regulations was handled entirely by the Secretary of the Navy. Inasmuch as the Navy Regulations and changes therein are now personally approved by the President, it follows that a provision of such regulations in individual cases can be suspended, if at all, only by the personal action of the President. File 5460-80, J. A. G., Jan. 22, 1913, pp. 2-3."

"Regulations, Navy, 16, holds that the Secretary of the Navy may create and amend regulations under R. S. 1547 and follows that he may therefore waive such regulations."

"92. Same—A Navy regulation issued under section 1547, R. S., may be waived by the Secretary of the Navy, File 3980-1044, Mar. 19, 1915. See also Acting Assistant Surgeons, 2, holding that departmental circulars may be waived."

"93. Same—Policy of the department—'The department is averse to waiving the provisions of the Regulations except in cases of great necessity.' File 17789-10, Sec. Navy, May 5, 1909, with reference to waiving age requirements for appointment of warrant officers."

"94. Same—'A regulation is usually simply a method of administering a law. Such is the regulation in question. It was made to aid you in the administration of this appropriation and is binding upon your subordinates so long as you do not abrogate or waive it. You are at liberty, in my judgment, to change, modify, or waive it at your pleasure, always provided that you do not violate some law in your changed or modified regulation, or by making such change, modification, or waiver, you do not encroach upon or abrogate some contractural right fully vested before notice of such change, modification, or waiver.' (9 Comp. Dec. 280). File 5460-60, J. A. G. Jan. 22, 1913."

"95. Same. 'The provisions of 1-4721 may be waived within the discretion of the department.' File 26516-162 J. A. G., Dec. 8, 1914, C. M. O. 6, 1915, 9."

APPENDIX B.

"This while in doing, towards the Amendment of matters on Shore, and the State of the Ships in Harbour; no less thoughtfulness was at work for the Recovery of good Discipline and Reformation of Disorders at Sea. And this pursu'd, to the drawing a no inconsiderable Encrease of standing Charge upon the Crown, the more surely to effect his Majesties desires herein, with the satisfaction of his Commanders and other his Officers and Seamen interested in the same. The evidencing of which will not need more than one of sundry instances to be produc'd of it, namely, that of the Establishment in July 1686 (of near Date with the foregoing Commission) the Tenor whereof follows.

His Majesties Regulation in the business of Plate-Carriage, &c. with his Establishment of an Allowance to his Sea-Commanders for their Tables and other Encouragements to them, their Officers, and Companies.

JAMES R.

"Whereas from the Enquiries by us solemnly made (since our accession to the Throne of this our Kingdom of England) into the State of our Royal Navy, and the general Disorders into which both it and its Discipline have of late years fallen, we are (among the many other evils discovered therein, and which we have already in great measure provided Remedies to) arrived at a full Information in that particular one, whereto our Service is in a most especial manner exposed, from the liberty taken by Commanders of our Ships (upon all opportunities of private profit) of converting the Service of our said Ships to their own use, and the total neglect of the Publick Ends for which they, at our great Charge, are set forth and maintained, namely, the annoying of our Enemies, the protecting the Estates of our Trading-Subjects, and the support of our honour with Forreign Princes. And

forasmuch also as this Evil seems principally to arise from the universal abuse of the liberty for some time indulged to Our said Commanders, of Transporting of Plate, Bullion and Jewels; to the occasioning thereby the said General mis-employment of our Ships, and our want of those full and frequent Accounts of the Proceedings of our Commanders abroad which by their known Instructions they stand obliged to give us. Our Will and pleasure is, and it is hereby solemnly declared.

"I. That no Admiral, Commander in Chief, Captain of any our Ships, or other Officers serving us therein, shall presume from henceforward upon any pretence, or by virtue of any former Allowance, Intruction, or Practice whatsoever, to receive, direct, or permit to be received, on board any of our said Ships, any Mony, Plate, Bullion, Jewels, or other Merchandize or Goods (fine or gross) whatsoever, whether belonging to Strangers or our own Subjects, either under pretext of concealing or protecting the same, or the Transporting thereof from Port to Port, or from any Forreign Port for England, whether upon Application to them made by any our Merchant-Subjects in Forreign parts, or from any other inducement whatsoever, saving by Written Warrant under our own Royal hand, and that only upon pain of being (on conviction) immediately discharged from their present and rendred incapable of any future Employment in our Service, as also of refunding to the use of our maimed Seamen of the Chest at Chatham, the full value of the profits they shall be found to have made by any violation of this our Order, and of suffering such further punishment, as by the Laws of the Sea, they shall become liable to for the same.

"II. That none of our aforesaid General Officers or private Commanders shall (upon like forfeiture and penalties) presume to carry, or direct the carrying any Passenger or Passengers (whether strangers or others) of what Degree or Quality soever, from one place to another, in any of our Ships

of War under their Command, unless by like particular Order given in Writing from our self for their so doing; such only excepted, as by the Eleventh Article of our present General Instructions they are obliged to receive and give passage to; namely, our Subjects redeemed from Slavery, Shipwreckt, or taken at Sea out of Forreign Ships. * * *

"And to the end, that with the Provision thus made towards the recovery and advancement of the Honour, Discipline, and Prosperity of our Naval-Service. We may at the same time Testifie our like Royal inclination to the giving all reasonable Encouragement to those, who shall from henceforward be employed as Commanders in any of our Ships; thereby as well to excite and oblige them to a strict complyance with these and all other our Royal Resolutions and Orders, as the better to enable them to support the Charge and Dignity of their said Employments and Entertainment therein, without resorting to Methods of doing it so injurious to our Honour and Service, and wasteful of our Treasure, as those before-mentioned have been. We are in the first place graciously pleased (in favour to our said Commanders) to take upon our self an encrease of Charge, beyond what has ever hitherto been at any one time done by any of our Royal predecessors, namely, by granting (as we hereby do) to the Commanders of every of our Ships and Vessels (yachts only excepted) an annual Allowance (over and above the value of the Victualling they now enjoy in common with their Ship's Companies) for the support of their Tables, proportioned to the respective Rates of the Ships and Vessels they shall happen severally to Command. The said Allowance to commence upon those of our Ships which are now fitting forth, and shall at any time hereafter be fitted forth to the Seas, from the Date and Delivery of their Commanders and Signing Officers joynt Certificates to the Secretary of our Admiralty, and Commissioners of our Navy, of their Ships being compleatly fitted for the Sea, and in readiness to Ex-

ecute our final Orders for their Sailing. And upon such of our Ships as are at this present abroad; from the day of their Commanders receiving from our said Secretary (which he is with all convenient speed to dispatch to them) copies of this our Order; and to be continued both on the one and the other to the Determination of their respective Voyages. The value of which allowance hereby so granted is as follows. * * * Lastly, we are hereby graciously pleased further to declare to all our said Admirals, Commanders in chief, and private Commanders, that as our Royal Expectation will from henceforward be, to have a strict Account given us of their careful applying themselves to the Execution and Observance of these and all others our Orders, with intention of expressing our severest Displeasure against such of them (whoever they be) as shall be found in any wise negligent or unfaithful in the same. So are we no less graciously determined at the end of their respective Voyages, to Testifie by some especial instance of our Bounty (beyond what is hereby already so Extraordinarily provided for them) our particular Regard to whoever of our said Commanders shall appear to have merited the same from us, by any signal instances of their Industry, Courage, Conduct or Frugality evidenced therein on our behalf. Given at our Court at Windsor this 15th day of July 1686.

By his Majesties Command

S. PEPYS."

Pepys Memoires, Relating to the State of the Royal Navy of England, For Ten Years, Determin'd December 1688, printed Anno MDCXC. pp. 101-9, 115-19, 124-6.

IN THE

Supreme Court of the United States of America

October Term, 1922

No. 290

UNITED STATES GRAIN CORPORATION

Plaintiff-in-Error

against

WALLACE B. PHILLIPS

Defendant-in-Error

Brief for Defendant-in-Error

HAROLD N. WHITEHOUSE
EDWARD S. HATCH
MAURICE W. CLARKE
Counsel for Defendant-in-Error
522 Fifth Avenue
New York, N. Y.

Appeal Printing Company, 33 Thomas Street, New York City

INDEX.

PAGE

THE FACTS 1

POINT I.—The right of a commanding officer to receive compensation from the person who places gold on board his ship for freight is provided for by law 6

POINT II.—The Secretary of the Navy is without power to suspend the provisions of Article 1510 of the Navy Regulations, or to issue an order inconsistent with the provisions of Section 1624 of the Revised Statutes 12

POINT III.—The order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations was not intended to, and did not apply to the Plaintiff-in-Error or its gold .. 18

POINT IV.—The gold in question was not taken on board the United States Ship *Laub* and transported to New York pursuant to an order issued by the Secretary of the Navy 22

POINT V.—The order, issued by the Secretary of the Navy, made the suspension of Article 1510 of the Navy Regulations depend upon certain conditions precedent, which were not complied with 25

PAGE

POINT VI.—Neither the conditions imposed by the order of the Secretary of the Navy, nor the rights provided by Sec. 1624, Revised Statutes and Article 1510 of the Navy Regulations, were waived by the commanding officer 30

POINT VII.—The order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations, not having been approved by the President, was invalid 35

POINT VIII.—The genesis and status of the United States Grain Corporation 37

POINT IX.—The transaction between the United States Grain Corporation and the Government of Bulgaria was private, not governmental 42

LIST OF CASES CITED.

Balfour *v.* Parkinson, 84 Fed., 855 35
Bennecke *v.* Insurance Co., 105 U. S., 353 35
Cartas *v.* United States, 250 U. S., 545 ....13, 15, 31
City of Hannibal *v.* Winchell, 54 Mo., 172-177 12
Equitable Society *v.* McElroy, 83 Fed., 631 ... 35
Federal Sugar Refin. Co. *v.* United States, S. E. Board, 268 Fed., 575-583 .....47, 48
Glavey *v.* United States, 182 U. S., 606 .....8, 31
Goldsborough *v.* United States, Taney's Decisions, 80 11
Gould Coupler Co. *v.* United States Shipping B'd. Emergency Fleet Corp., 261 Fed., 716 51
Haynes *v.* State, 15 Ohio St., 455-458 12
Henry Gas Co. *v.* United States, 191 Fed., 132-139 14
In re Kollock, 165 U. S., 526-536 .....8, 31

PAGE

In re Fair, *et al.*, 100 Fed., 149 22
Insurance Co. *v.* Thomas, 82 Fed., 406 35
Meade *v.* United States, 81 Fed., 684-692 14
People *v.* Coughtry, 58 Hun, 245 12
Panama R'y. Co. *v.* Curran, 256 Fed., 768 43
Rice *v.* Fidelity and Deposit Co., 103 Fed., 427 34, 35
Smith *v.* Whitney, 116 U. S., 181 ..... 8, 31
Sloan Shipyards Corp., *et al. v.* United States Shipping B'd., Emergency Fleet Corp., Nos. 308, 376 and 526, Oct. Term, 1921, Supreme Court of the United States 48
Salus *v.* United States, 234 Fed., 842-844 51
The Lake Monroe, 250 U. S., 246-251 50
United States *v.* Strang, 254 U. S., 491-493 48
United States *v.* Hammers, 221 U. S., 220 7
United States *v.* Hermanos, 209 U. S., 337 7
United States *v.* Hill, 120 U. S., 169 7
United States *v.* Symonds, 120 U. S., 46-49 ...13, 31
Williamson *v.* United States, 207 U. S., 425 ... 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

against

WALLACE B. PHILLIPS,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

The Facts.

At the times mentioned in the complaint, Wallace B. Phillips, Defendant-in-Error, was the commanding officer of the United States Ship *Laub*, of the United States Navy. (Par. "IX" of Complaint, admitted by Answer, Rec., p. 5).

Josephus Daniels was Secretary of the United States Navy; Admiral Knapp, the ranking United States Naval officer in South European waters; Rear Admiral Bristol, the senior United States Naval officer in command in Turkish waters (Par. 3, "Defendant's Exhibit B." Rec., p. 36).

The United States Grain Corporation, Plaintiff-

in-Error, is, and has been since August, 1917, a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (Par. II of Complaint, Rec., p. 4, admited by Par. I of Answer, Rec., p. 6). The creation of this corporation was commanded by an executive order dated August 14th, 1917, for the purpose, among other things, of enabling the United States Food Administration to purchase and sell wheat flour and other foodstuffs ("Exhibit No. 2," Rec., p. 41). All the business of the United States Grain Corporation was conducted in its own name (Par. 7, "Defendant's Exhibit D," Rec., p. 41).

In August, 1919, the Plaintiff-in-Error entered into a written agreement with the Government of Bulgaria wherein and whereby it agreed to sell and deliver to Bulgaria fourteen thousand tons of wheat flour (Rec., p. 5, and "Plaintiff's Exhibit 2," Rec., p. 32).

Plaintiff-in-Error received from Bulgaria, in payment for said flour, the sum of $5,170,000 in gold, which it placed on board the United States Ship *Laub*, at Constantinople, Turkey, for transportation therefrom to the City of New York (Par. X of Complaint, admitted by Answer, Rec., p. 5).

Defendant-in-Error, as commanding officer of said ship *Laub*, signed bills of lading for the amount of said gold (Par. XI of Complaint, admitted by Answer, Rec., p. 5).

Article 1510 of the Navy Regulations of 1913 provides:

> "When gold, silver or jewels shall be placed on board of any ship for freight or safe keeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and

be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows: One fourth to the commander-in-chief; one half to the commanding officer of the ship; one fourth to the Navy Pension Fund. To entitle the commander-in-chief to receive any part of the amount, he must have signified to the commanding officer of the ship, in writing, his readiness to unite with him in the responsibility for the care of the treasure or other valuable" (Complaint, Par. VII, Rec., p. 4).

Prior to the gold having been placed aboard the United States Ship *Laub* by Plaintiff-in-Error, Admiral Knapp cabled Secretary Daniels that the Relief Administration requested that the mandatory provisions of Article 1510 of the Navy Regulations be suspended, as the Relief Administration desired to ship five millions in gold to the United States. In answer thereto, the Secretary cabled Admiral Knapp that the Department suspended the said mandatory provisions on the condition that the commanding officer and the United States Government be released from all responsibility ("Exhibit B of C," Rec., p. 38).

After the gold had been taken on board the United States Ship *Laub*, one Major Galbraith delivered to Defendant-in-Error a document purporting to be a release by the United States Food Administrator of Defendant-in-Error and the United States Government from all responsibility ("Exhibit A of C." Rec., p. 38).

Having read the document, Defendant-in-Error gave to Major Galbraith a document in which it is stated that Defendant-in-Error refuses to accept the proffered release, and a demand was thereupon

made by Defendant-in-Error for the usual freight charges for the transportation of the gold ("Exhibit C of C," Rec., p. 39, and Par. 4, "Defendant's Exhibit C," Rec., p. 36).

Thereafter Defendant-in-Error received from Admiral Bristol, movement order No. 46, directing Plaintiff-in-Error to proceed with the United States Ship *Laub* to New York, and authorizing him, in accordance with Article 8 of the Articles for the Government of the Navy, and Article 1510 of the Navy Regulations, to receive on board, and to transport to New York, the gold of Plaintiff-in-Error ("Exhibit D of C," Rec., p. 39).

On or about September 15th, 1919, the said United States Ship *Laub*, having said gold on board, and with Defendant-in-Error as commanding officer thereof, proceeded from Constantinople, Turkey, and arrived at the City of New York on or about October 6th, 1919; and thereupon Defendant-in-Error delivered to Plaintiff-in-Error the said gold, and Plaintiff-in-Error accepted and received same (Par. XII of Complaint, admitted by Answer, Rec., p. 5).

Before the delivery of the gold to Plaintiff-in-Error, Defendant-in-error again demanded the usual percentage for freight, which was one percentum of the value of the gold, but Plaintiff-in-Error refused to pay the same or any part thereof (Pars. 1, 4 and 5 of "Defendant's Exhibit C," Rec., p. 36).

In the brief for Plaintiff-in-Error, under the title "THE FACTS," the following statements of facts are either erroneous or unwarranted:

> 1. (Page 5): Having referred to an Act of Congress, dated February 25, 1919, and an Executive Order, dated March 1st, 1919, re-

lating to foreign relief, Plaintiff-in-Error states, "*Pursuant* thereto, the Defendant entered into an agreement with the Government of Bulgaria in March, 1919." The Act and Order referred to are set forth on page 51 of the Transcript of Record, and it will be observed that transactions with Bulgaria are specifically excluded by the Act which is entitled "An Act for the relief of such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, Bulgaria and Turkey, as may be determined upon by the President as necessary."

2. (Page 5): There is not a particle of evidence in this case that "this gold * * * at various times during the spring and summer of 1919 * * * was transported from Varna to Constantinople for the Defendant on various United States war vessels stationed in or about the latter port (Varna, Bulgaria.)"

3. (Page 6): There is no evidence in this case that "then the Defendant, being desirous of shipping the gold to the United State applied to the United States Navy Department for permission to ship the gold from Constantinople to the United States on board a United States War Vessel, and requested the Navy Department to suspend the above mentioned Section 1547 of the U. S. Navy Regulations."

The only evidence in the case relating to an application to the Secretary of the Navy, or the Navy Department, for the suspension of 1510 of the Navy Regulations, is that contained in Admiral Knapp's cablegram to the

Secretary which is set forth on page 6 of Plaintiff-in-Error's Brief, and which discloses that the application was made by the *Relief Administration* and not by Plaintiff-in-Error.

4. (Page 7): Plaintiff-in-Error states that its representative and agent in this transaction was Major Galbraith. The evidence shows that Plaintiff-in-Error's contract with Bulgaria was entered into by one Howard Heinz, as agent for the United States Food Administration Grain Corporation. ("Plaintiff's Exhibit 2," Rec., p. 32.)

I.

The right of a commanding officer to receive compensation from the person who places gold on board his ship for freight is provided for by law.

Sect. 1624, Art., 8, U. S. Revised Statutes: (Chap. 1, Article 8, Subdivision 13, Articles for the Government of the Navy), provides:

Sub-Div. 13. "Or takes, receives or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver or jewels, for freight or safe keeping; or demands or receives any compensation for the receipt or transportation of any other article than gold, silver or jewels, without authority from the President or Secretary of the Navy."

This Act, while providing offenses which are subjects of court martial, impliedly authorizes commanding officers to take on board the vessels under their command, gold, silver or jewels, for

safe keeping or freight, and to demand and receive compensation for the service.

The meaning of these provisions, if it can be said to be obscured by ambiguity, has been construed by the Navy Department in having promulgated Article 1510 of the Navy Regulations pursuant to the power and authority contained in said Sec. 1624, Art. 8, Par. 13, U. S. Revised Statutes. (Par. 3, "Defendant's Exhibit C." Rec., p. 37.)

It having been the duty of the Secretary of the Navy to administer the statute in question, his construction thereof is determinatively persuasive on the courts.

> *U. S.* v. *Hammers*, 221 U. S., 220;
> *U. S.* v. *Hermanos*, 209 U. S., 337;
> *U. S.* v. *Hill*, 120 U. S., 169.

Article 1510, Navy Regulations (1913) provides:

> "When gold, silver or jewels shall be placed on board of any ship for freight or safe keeping, as provided by the Articles for the Government of the Navy, the commanding officer shall sign bills of lading for the amount and be responsible for the same. The usual percentage shall be demanded from the shippers, and its amount shall be divided as follows: One-fourth to the commander-in-chief, one-half to the commanding officer of the ship; one-fourth to the Navy Pension Fund. To entitle the commander-in-chief to receive any part of the amount, he must have signified to the commanding officer of the ship, in writing his readiness to unite with him in the responsibility for the care of the treasure or other valuable. Where a commander-in-chief does not participate in a division, two-thirds shall inure to the commanding officer of the ship and the remainder to the pension fund."

Sec. 8, Art. 1, of the Constitution of the United States, provides, that Congress shall have power:

> "To make Rules for the Government and Regulation of the land and naval Forces."

In conformity to the power thus delegated to it, Congress enacted the following law:

Sec. 1547, U. S. Revised Statutes:

> "The orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may have adopted, with the approval of the President, shall be recognized as the Regulations of the Navy, subject to alterations adopted in the same manner."

Article 1510 of the Navy Regulations was a regulation issued by the Secretary of the Navy prior to July 14, 1862. (Par. VII of Complaint, Rec., p. 4, admitted by Answer, Rec., p. 6.)

Because of this Congressional identification and recognition, Article 1510 of the Navy Regulations has the full force and sanction of the law.

> *Smith* v. *Whitney*, 116 U. S., 181;
> *Glavey* v. *U. S.*, 182 U. S., 606;
> *In re Kollock*, 165 U. S., 526-536.

In the case of *Cartas* v. *United States*, 250 U. S., 545, it was held, that Article 1020 of the Navy Regulations (later renumbered 1510) is nothing more than an elucidation of Section 1624 of the Revised Statutes.

From what has preceded, it is obvious that Article 1510 of the Navy Regulations is the law governing the subject-matter of gold placed upon naval vessels for freight.

The provisions of the Regulations under con-

sideration are clear and unequivocal. They provide the rights and obligations of the shipper and commanding officer, once gold is taken on board. The terms of the contract of shipment are imposed by the law. The directions are mandatory. The commanding officer "shall sign bills of lading for the amount and be responsible for the same. The shipper shall pay the "usual percentage."

The tender and acceptance of the gold must conform to the provisions of the law. Neither the shipper nor the commanding officer is at liberty to modify, change or vary in the slightest degree the terms thereof.

The regulation does not, and could not, compel a person to transport gold, silver or jewels on a navy vessel; nor does the regulation oblige a commanding officer to accept the same for transportation. But it may, and most clearly and emphatically does provide under what conditions it will permit the transportation thereof.

If, as contended by the Plaintiff-in-Error, the statute and regulation in question do not in and of themselves impose any obligations upon a shipper who places gold on board a navy vessel for freight, then the provisions of Article 1510 of the Navy Regulations are without force or effect. But this would be a legal incongruity. How can it be said that a regulation having the force and effect of a statute, and specifically providing that the shipper of gold on a navy vessel shall pay "the usual percentage" for freight, obliges the shipper to do no such thing?

To argue that what compensation, if any, a shipper of gold on a navy vessel is to pay for the service, depends upon the ability or inclination of the commanding officer to strike a bargain, loses sight

entirely of the fact that the compensation provided for by Article 1510 of the Navy Regulations is in part to support the Navy Pension Fund. Are the provisions therein to the effect that the commander-in-chief shall receive one-fourth and the Navy Pension Fund one-fourth of the "usual percentage for freight" made to depend upon the legal ability of the commanding officer to negotiate a formal contract to that effect? This necessarily presupposes that Congress is without power to impose any conditions upon the shipper of gold who uses a navy vessel for that purpose, although the vessel is the property of the United States and subject to the regulation of Congress.

Gold may be taken on board a navy vessel for freight solely because Congress, having the Constitutional right to provide in the premises, has authorized the service. One seeking to avail himself of the right conferred may do so only by accepting the obligations imposed.

The following facts are admitted:

1. That Wallace B. Phillips, the Defendant-in-Error, was the commanding officer of the United States Ship *Laub*. (Par. IX of Complaint, Rec., p. 5; admitted by Answer, Rec., p. 6.)

2. The gold in question was the property of Plaintiff-in-Error and was placed by it on board the United States Ship *Laub* at Constantinople for transportation to New York. (Sec. 8, "Defendant's Exhibit D," Rec., p. 42, and Par. X of Complaint, Rec., p. 5; admitted by Answer, Rec., p. 6.)

3. That Wallace B. Phillips, as command-

ing officer, signed bills of lading for the amount of said gold. (Par. XI of Complaint, Rec., p. 5; admitted by Answer, Rec., p. 6.)

4. The gold was thereafter transported aboard the United States Ship *Laub* to New York and delivered to Plaintiff-in-Error. (Par. XII of Complaint, Rec., p. 5; admitted by Answer, Rec., p. 6.)

5. That the usual percentage for freight was demanded of the shipper. (Par. 4, "Defendant's Exhibit C," Rec., p. 37.)

When the admitted facts and provisions of law applicable thereto are considered together the obligation of the Plaintiff-in-Error to pay the "usual percentage of freight" seems clear and beyond dispute. However, Plaintiff-in-Error advances several reasons why, in the instant case, the said obligation did not arise. The main contention is predicated upon an alleged suspension of the provisions of Article 1510 of the Navy Regulations by the Secretary of the Navy.

This contention depends upon two necessary postulates, namely: (1) that the Secretary of the Navy possessed the power to suspend the regulation, and (2) that he actually did so.

II.

The Secretary of the Navy is without power to suspend the provisions of Article 1510 of the Navy Regulations, or to issue an order inconsistent with the provisions of Section 1624 of the Revised Statutes.

To assume the contrary is to conclude that both the statute and regulation are subject to modification, amendment or repeal at the pleasure of the Secretary of the Navy. A variant of this proposition is that the Secretary may by an order repeal a Congressional enactment; for if the law may be suspended by an order in an individual case for a definite period of time, it may, by the same process of logic, be suspended in all cases for an indefinite period. And this, in practical effect, would be a repeal.

From whence comes this extraordinary power contended for? The head of an executive department has not the inherent power to issue orders in conflict with the law. The authority to alter, amend or repeal laws is vested in Congress; and these legislative prerogatives never pass by implication.

Section 1547, U. S. Revised Statutes (quoted in full under the First Point) provides that the Secretary of the Navy may, with the approval of the President, alter a Navy regulation.

"Alter" means to change or modify the form of a thing, not to abrogate or dispense with it.

Haynes v. *State*, 15 Ohio St., 455-458;
City of Hannibal v. *Winchell*, 54 Mo., 172-177;
People v. *Coughtry*, 58 Hun, 245.

It is important to note that both the provisions of Section 1624 of the Revised Statutes and Article 1510 of the Navy Regulations provide for compensation to be paid for safe keeping or transportation of gold.

In the case of *Cartas* v. *United States*, 250 U. S., 545, wherein it is held that the regulation is merely an elucidation of the statute, the Court particularly emphasizes the fact that the statute provides compensation for services rendered.

Two very substantial reasons suggest themselves why the Secretary of the Navy was without power to suspend the provisions of Article 1510 of the Navy Regulations. First, his orders and regulations must be consistent with law; and, second, he has not the power to diminish an officer's compensation as provided for by law.

The case of *United States* v. *Symonds*, 120 U. S., 46-49, completely sets at rest any doubt that may be entertained on this point. It is therein, among other things, held:

> "Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service. The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the Naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplemental to, but not in conflict with the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court."

In the case of *Meads* v. *United States*, 81 Fed., 684-692, it was held:

> "The various departments are organized to give practical effect, in detail, to the power, authority and purpose vested therein by Congress. Regulations must be confined within the limits of such power, authority and purpose."

The limitation upon the power of the head of an executive department is stated in the case of *Henry Gas Co.* v. *United States*, 191 Fed., 132-139, as follows:

> "The Secretary * * * may prescribe reasonable rules and regulations not inconsistent with, or contrary to the laws of Congress."

To the same effect, as the above-quoted cases, are the following:

> *Williamson* v. *United States*, 207 U. S., 425;
> *Goldsborough* v. *United States*, Taneys Decisions, 80.

On page 24 of its brief, Plaintiff-in-Error concedes this point by citing with approval the decision in the case of Symonds Case, 21 Ct. Cs. R., 148, holding that Navy Regulations must conform to the law.

Any order or regulation, issued by the Secretary of the Navy, providing that gold shall be taken on board a Navy vessel without charge is in diametrical opposition to the provisions of Section 1624 of the Revised Statutes and Article 1510 of the Navy Regulations. Such an order or regulation would not only be inconsistent with law but in utter disregard of it.

At this point, it may be meet to consider a propo-

sition advanced by the District Judge in passing upon the case, to wit:

> "But if the plaintiff was in fact under unconditional orders to carry the gold, his consent or even his promise to do so was not a valid consideration" (Op., D. J., Rec., p. 14).

Plaintiff-in-Error admits (Its Brief, p. 65) that an order to carry gold for a private individual would be illegal.

If the Secretary's cablegram to Admiral Knapp (Rec., p. 38, Exhibit B of C), purporting to suspend Article 1510 of the Navy Regulations, is taken to be an "unconditional order" to transport the gold without compensation, it has been shown to be invalid, because of its inconsistency with law. But there is a further reason why the cable referred to would be invalid if considered in the light of an order, and that is because an order to a commanding officer to transport gold is inconsistent with a discretion possessed by him to do so.

Again referring to the decision in the case of *Cartas* v. *United States*, 250 U. S., 545, we find this statement:

> "The wide discression possessed by a commanding officer to accept gold for freight, which it was the obvious purpose of the statute not to modify."

If the law provides the commanding officer with discretion to accept or reject gold offered as freight, an unconditional order to accept it utterly destroys that right of discretion.

There is no conceivable way of viewing the Secretary's cablegram (Exhibit B of C, Record., p. 38), to give it so much as the appearance of valid-

ity. It seeks to annul every power and right vouchsafed the commanding officer by both the statute and regulation; and it deprives others, as well as the commanding officer, of the compensation provided to be paid by shippers of gold.

Plaintiff-in-Error does not so much as suggest the source of this extraordinary power it contends the Secretary of the Navy possesses to order that navy vessels be put at the disposal of private parties for the transportation of their gold. The only right to use navy vessels for that purpose is found in the provisions of the statute and regulation under consideration; and if he can suspend the provisions thereof, then, when he has done so, there ceases to be any authority for the transportation of gold in the Secretary or anyone else.

Assuming that the Secretary of the Navy has the general power to suspend navy regulations, and it is not admitted, the decisions above quoted distinctly hold that he may not do so when the suspension will alter, change or modify some Congressional act covering the same subject-matter. And it is obvious that an order suspending the provisions of Article 1510 of the Navy Regulations, in so far as they provide for compensation for the transportation of gold, cannot be reconciled with the provisions of 1624 of the Revised Statutes, providing that the commanding officer may demand and receive compensation for that very service.

What the Secretary assumed to do in the instant case was to temporarily suspend the provisions of a statute, and a regulation, having the force and effect of law.

It is of no importance what motive actuated the Secretary of the Navy in the premises; he was not justified in attempting to suspend the provisions

of law, and to deprive the Navy Pension Fund, as well as certain naval officers, of emoluments that Congress intended them to receive.

Plaintiff-in-Error states in its brief (p. 22) that no cases in the courts can be found authorizing the suspension by the Secretary of the Navy of such a regulation, but that the Judge Advocate General has rendered opinions to the effect that the Secretary may do so. These opinions are set forth in its brief as "Appendix A" (p. 71). In view of the fact that the power of the Secretary of the Navy to issue orders, regulations and instructions is clearly defined by the statutes, and decisions of the courts, referred to under this point, the opinions of the Judge Advocate General do not seem to be of any importance in determining the question. In any event, however, they do not hold what Plaintiff-in-Error contends for.

It is stated in the opinion designated "91" (Plaintiff-in-Error's Brief, p. 71):

> "In the case considered by the Comptroller it appears from his decision that the Secretary of the Navy directed that the operation of the regulation in question be suspended; and the Comptroller stated that such regulation 'was waived by the power which made these regulations.' This last statement was literally true, as at that time Navy Regulations and changes therein were not expressly approved by the President, but the entire matter of making, modifying, repealing and suspending or waiving Navy Regulations was handled entirely by the Secretary of the Navy. *Inasmuch as the Navy Regulations and changes therein, are now approved by the President, it follows that a provision of such regulations in individual cases can be suspended, if at all, only by the personal action of the President.*

This opinion was rendered in January, 1913, so as regards the instant case the Judge Advocate General first admits doubt that a Navy Regulation may be suspended, by stating, "that a provision of such regulations in individual cases can be suspended, *if at all*" etc. Continuing, the Judge Advocate General states in effect, that, in any event a suspension may be had "only by the personal action of the President."

The attempted suspension of the provisions of Article 1510 of the Navy Regulations, in the instant case, was not by the personal action of the President; neither did it have his actual approval. And for that reason, if for none other, it was invalid, and this question is more fully discussed under Point "VII" herein.

In the opinions designated "93" and "94" (p. 72, Brief of Plaintiff-in-Error) it is stated, that, "The Department is averse to waiving the provisions of the Regulations except in cases of great necessity," and that it is without power to do so if the waiver violate some law relating to the subject-matter thereof.

III.

The order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations was not intended to, and did not, apply to the Plaintiff-in-Error or its gold.

The Secretary's order purporting to suspend the provisions of the regulation in question was issued in response to a cablegram sent to him by Admiral Knapp, reading in part as follows:

> "Mission 555.—Relief Administration desires ship about five millions gold to United States from Constantinople," etc. (Exhibit B of C. Rec., p. 38).

Replying to this request the Secretary cabled Admiral Knapp:

> "Your Mission 555 approved, Department suspends mandatory provisions Article 1510 Navy Regulations," etc. (Exhibit B of C. Rec., p. 38).

The purport of the Secretary's order is clear. He suspends the provisions of Article 1510 of the Navy Regulations to permit the *Relief Administration* to ship to the United States, aboard a navy vessel and without cost, about five millions in gold. Having received the request and issued the order, the Secretary's entry into and departure from this case is completed. There is not a scintilla of evidence that the Secretary intended anything else than what his order plainly stated, to wit, to grant the *Relief Administration* a special exemption of the obligation imposed by the regulation.

Plaintiff-in-Error, however, boldly proclaims itself to be the beneficiary of this order; and alleges in its answer that the application for the suspension was made in its especial behalf (Par. 15, Answer, Rec., p. 9). We use the word "boldly," advisedly, for having made the allegation, Plaintiff-in-Error rested. Not only did it omit to prove, upon the trial of this action, any fact or circumstance that so much as justifies an inference that the Secretary of the Navy intended to bestow the benefit upon itself, but has disdained to explain the matter "off the record."

May we again call the Court's attention to the admitted facts, to wit, that the gold in question

in the instant case, was the property of the United States Grain Corporation, and by it was placed on board the United States Ship *Laub* for transportation to New York (Sec. 8, "Defendant's Exhibit D," Rec., p. 12, and Par. X of Complaint, Rec., p. 5, admitted by Answer, Rec., p. 6).

There *was* an organization, at the times in question, known as the "Relief Administration," so that it cannot be successfully contended, without some evidence to support it, that the Secretary in fact intended the United States Grain Corporation when he referred to the "Relief Administration." There is nothing in the case indicating that the Secretary had the slightest notion that the gold referred to by Admiral Knapp was the property of the Plaintiff-in-Error herein.

The *Relief Administration* was organized by an Executive Order, dated March 1st, 1919 (Exhibit "No. 4," Rec., p. 51), and this order was predicated upon an Act of Congress, approved February 25, 1919, and entitled, "*An Act providing for the relief of such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, Bulgaria and Turkey, as may be determined upon by the President as necessary.*"

It is of some importance to note that the Act of February 25, 1919, excluded Bulgaria from its purview; and that the gold that Plaintiff-in-Error transported on the United States Ship *Laub* was obtained by it from Bulgaria (Par. X of Complain, Rec., p. 5; admitted by Answer, Rec., p. 6). It cannot, therefore, be fairly argued that the Secretary of the Navy intended the suspension to apply to the Plaintiff-in-Error's gold, when it is clear that his order referred to gold, the property of the "Re-

lief Administration," which could not have been gold obtained from Bulgaria because the Relief Administration's activities excluded Bulgaria. And there is nothing in this case to indicate where the gold, referred to in Admiral Knapp's cablegram to the Secretary, had been obtained from.

Plaintiff-in-Error contends for an extraordinary exemption from an obligation imposed by law to pay a certain compensation for services rendered, and the burden of proof is upon it to clearly establish its rights to this exemption. This, Plaintiff-in-Error has utterly failed to do. On the contrary the facts of the case prove beyond a point of successful contradiction that the order of the Secretary did not, and was not intended to, apply to Plaintiff-in-Error, or its gold.

The Relief Administration and the United States Grain Corporation were separate and distinct entities. When the Secretary of the Navy issued his order, there was not the slightest affinity or relationship between them in the matter of the transaction with Bulgaria.

That Congress authorized the organization of the Relief Administration, for the purpose of promoting a humanitarian cause, may very well have been the motive actuating the Secretary in issuing the order suspending the regulation for the benefit of *that* organization. But Congress had not seen fit, at that time, to extend any charity to the populations of Bulgaria. And it is a matter of serious doubt that the Secretary would have attempted to deprive naval officers, and the Navy Pension Fund, of emoluments, to accommodate the United States Grain Corporation which had obtained the gold in question solely as the result of a commercial trans-

action between that corporation and the Government of Bulgaria (Pars. VIII and X of Complaint, Res., p. 6; admitted by Answer, Rec., p. 6).

In any event, the fact remains that at no time were the provisions of Article 1510 of the Navy Regulations suspended for the benefit of Plaintiff-in-Error, or its gold.

IV.

The gold in question was not taken on board the United States Ship Laub and transported to New York pursuant to an order issued by the Secretary of the Navy.

It appears to be the law, that a subordinate is not obliged to obey an order of his superior which is in excess of the authority invested in the superior, or is otherwise illegal. Further, if it appears upon the face of the order that it is in excess of authority, the subordinate should not obey it.

In re Fair, et al., 100 Fed., 149.

If the Secretary's cablegram to Admiral Knapp (Exhibit B. of C., Rec., p. 38) be construed to be an order for the transportation of gold, without charge, it is illegal, on its face, in being in derogation of the law. In which event, the subordinates are under no obligation to obey it.

The Secretary's cable is addressed to Admiral Knapp, the ranking U. S. Naval Officer in South European waters, and in the ordinary course, finds its way to Rear Admiral Bristol, who was the Senior U. S. Naval Officer in Turkish waters. (Par. 3, "Defendant's Exhibit B," Rec., p. 36.)

The only order that the commanding officer of

the United States Ship *Laub* received, is what is known as "Movement Order No. 46," issued to him by Rear Admiral Bristol. (Par. 4, "Defendant's Exhibit C, Rec., p. 37, and Exhibit D of C," Rec., p. 39.) This order does not direct the commanding officer to transport the gold pursuant to the Secretary's cable to Admiral Knapp, although a copy thereof is affixed to it. On the contrary, Admiral Bristol makes it very clear that, in his opinion, the Secretary's cable has nothing to do with the matter.

To quote from Movement Order No. 46:

> "In accordance with Article 8, of the Articles for the government of the Navy of the United States (Sec. 1624 of the Revised Statutes) and Article 1510 of the U. S. Navy Regulations, 1913, you are authorized to receive on board the vessel under your command * * * * such funds in gold, as are now stored on board the U. S. S. *Galveston*," etc.

This statement alone conclusively establishes the fact that the Secretary's cable, if it were an order, never passed Rear Admiral Bristol as such. That there should be not the slightest doubt of the purport of his order, Admiral Bristol, in Par. 3, thereof, assumes joint responsibility in the transportation of the gold as provided for by Article 1510 of the Navy Regulations.

Both Admiral Bristol and the commanding officer knew that the gold on board the United States Ship *Laub* was the property of the United States Grain Corporation. Not only has the Plaintiff-in-Error admitted this fact, but Par. 2, of Movement Order No. 46, designates the gold as the property of the Food Administration Grain Corporation, which was the name of Plaintiff-in-Error

prior to July 1, 1919. (Par. III of Complaint, Rec., p. 4, admitted by Answer, Rec., p. 6.)

Plaintiff-in-Error contends that Admiral Bristol *ordered* the transportation of the gold, by Movement Order No. 46. (Its Brief, p. 30.) The fact is that Admiral Bristol did no such thing. Movement Order No. 46 commanded the Defendant-in-Error to proceed to New York and upon his arrival there to "report to the Senior U. S. Naval Officer Present and inform Bureau of Navigation (Operations) your arrival by dispatch." (Movement Order No. 46, Rec., p. 39.) There was nothing in the nature of an order or command, relative to Plaintiff-in-Error's gold, contained therein. On the contrary the Commanding Officer was *"authorized"* to receive said gold on board and to transport it "in accordance with" the provisions of the Naval Regulation under consideration.

There were two very substantial grounds which justified Admiral Bristol and the commanding officer in ignoring the Secretary's order. If it was an order for the transportation of gold without charge, it was illegal upon its face. But, of greater importance is the fact that whatever the order was, it applied solely to the Relief Administration's gold and had no application to gold which belonged to the United States Grain Corporation.

Plaintiff-in-Error concedes (Brief, p. 26), "that, if the plaintiff (Defendant-in-Error) had taken the gold on board at Constantinople without anything having been said or done with regard to the suspension of the Regulation and had taken it to New York and delivered it to the defendant (Plaintiff-in-Error), * * * the plaintiff would have some ground for complaint." And it is re-

spectfully insisted that the fact is that nothing had been said or done with regard to the suspension of the regulation for the benefit of or concerning the Plaintiff-in-Error or *its* gold.

V.

The order, issued by the Secretary of the Navy, made the suspension of Article 1510 of the Navy Regulations depend upon certain conditions precedent, which were not complied with.

The Secretary's order provided, (1) that the commanding officer and the United States Government should be released from all responsibility, and (2) that the papers must be certified and signed by the proper officials ("Exhibit B of C," Rec., p. 38).

A release from responsibility, to have been of any validity or effect whatsoever, must have been the

(a) Release of the Relief Administration, if the order applied to that organization, or

(b) The release of the United States Grain Corporation, if that corporation was intended.

Plaintiff-in-Error does not contend that the commanding officer was released by the Relief Administration; so the matter is concluded here if the Secretary's order was made solely for the benefit of that organization.

In an effort to show its compliance with the conditions imposed by the Secretary's order, Plaintiff-in-Error alleges that L. C. Galbraith, *as its agent*, released the commanding officer and the

United States from all responsibility in respect to said gold (Par. 17 of Answer, Rec., p. 9). Accepting Plaintiff-in-Error's theory, that the Secretary's order was promulgated for *its* benefit, it logically follows that if it failed or neglected to release the commanding officer and the United States from all responsibility, the order suspending the regulation remained inoperative.

The alleged release is dated September 15th, 1919 ("Exhibit A of C," Rec., p. 38). On that date, and for a period of two and one-half months prior thereto, Plaintiff-in-Error's name was United States Grain Corporation (Par. III of Complaint, Rec., p. 4; admitted by Answer, Rec., p. 6).

Now, the indisputable fact is, *that the release under consideration is not, and does not purport to be, the release of the United States Grain Corporation.* It is nothing more or less than what it obviously was intended to be, and that is, the release of the *United States Food Administration.*

Major Galbraith states that the release is signed by him, not as agent of the United States Grain Corporation, but as *"Officer-in-charge U. S. Food Administration."* And that there might be no mistake as to whom he represented in the premises, he prefaces the release with the statement that, "In accordance with authority invested in me by Mr. Herbert Hoover, United States Food Administrator" ("Exhibit A of C," Rec., p. 38).

The United States Food Administration was created pursuant to an executive order of the President of the United States, dated August 10, 1917, and Herbert Hoover was appointed the United States Food Administrator ("Defendant's Exhibits E and F," No. 1, Rec., p. 43).

There is not a particle of evidence in this case

which so much as justifies an inference that, in reference to the transportation of the gold in question, there was the slightest affinity or relationship between the United States Food Administration and the United States Grain Corporation.

The gold was obtained by the United States Grain Corporation as the result of the sale to Bulgaria of 14,000 tons of wheat flour ("Plaintiff's Exhibit 2," Rec., p. 32; and Pars. VIII and X of Complaint, Rec., p. 5; admitted by Answer, Rec., p. 6).

It is true that some time prior to the issuance of the said release, the United States Grain Corporation was, for certain well-defined purposes, the agent of the United States Food Administration (No. 2, Rec., p. 44); but it was not, and could not have been, its agent in this Bulgarian transaction, for the reason that the United States Food Administration was wholly without power to trade with Bulgaria. Be that as it may, it is certain that the United States Food Administration was never, under any circumstances, the agent of the United States Grain Corporation. And it is as certain, that to sustain the contention that the release was that of the United States Grain Corporation, the United States Food Administrator must be proved to have been its agent, with power to issue such a release.

There is nothing in the evidence disclosing any power or right in the United States Food Administrator to invest Major Galbraith with authority to issue the said release on behalf of the United States Grain Corporation; and the release itself discloses that the Major had not the slightest intention of doing anything of the kind.

On page 36 of its brief, Plaintiff-in-Error, with-

out the slightest justification by the evidence in the case, makes the statement that the "Food Administration and the Food Administration Grain Corporation were terms that were used interchangeably, and signatures as one or as the other were all considered to be the same thing." *There is not a scintilla of evidence to that effect.* Plaintiff-in-Error cites (Rec., pp. 38, 39 and 42) as its authority for this statement; but there is absolutely nothing on these pages of the Record as much as justifying a speculation as to the facts asserted. Plaintiff-in-Error realizes the necessity of connecting the so-called release, which purports to be that of the United States Food Administration, with itself. But this it necessarily fails to do, because there is nothing in this case to show that the United States Food Administration had even the remotest connection with the sale of wheat flour to Bulgaria. Be that as it may, Plaintiff-in-Error does not so much as suggest that the *Relief Administration* was a term used interchangeably with the Food Administration or itself; and it was the Relief Administration that sought and obtained the purported suspension of Article 1510 of the Navy Regulations ("Exhibit B of C," Rec., p. 38).

In 1919, the officers of the United States Grain Corporation were Julius Barnes, President; Frank Crowell, First Vice-President, and fourteen second Vice-Presidents, among whom was *Edward M. Flesh, who had charge of all the United States Grain Corporation's activities in Europe, including Bulgaria* (fol. 46, Rec., p. 23; fol. 40, Rec., p. 19, and fol. 47, Rec., p. 23). The Food Administrator had no connection with the United States Grain Corporation, at the times in question; at least, if he had, the evidence fails to disclose the fact.

There is no conceivable way of reasoning Major Galbraith's document into being a release by, or on behalf of, the United States Grain Corporation.

The order of the Secretary of the Navy having been made conditional upon a release by the person for whose benefit it was issued, signed and certified by the proper officials; and neither of the conditions having been complied with, it follows that the said order never became operative.

If it were in other respects valid, the alleged release was defective in that it did not release the commanding officer and the United States "from all responsibility," as required by the Secretary's order.

Article 1510 of the Navy Regulations provides that the commanding officer shall be responsible for the gold taken on board (Par. VII of Complaint, Rec., p. 4).

The release imposes upon the commanding officer, and the United States, "such responsibility as is usually incumbent for care of public property" ("Exhibit A of C," Rec., p. 38).

Article 8, Articles for the Government of the Navy (being Sec. 1624, U. S. Revised Statutes) provides (Pars. 10 and 13) for such punishment as a court martial may adjudge to be inflicted on any person in the Navy who does not use his best exertions to preserve public property, or wastes or permits waste thereof.

How can the commanding officer be said to have been released from "all responsibility," when he was required to assume a responsibility so grave that the law provided, for his failure to observe it, such punishment as a court martial may adjudge?

It is an exquisite distinction, if distinction exists, between being responsible for the property, as

provided by Article 1510 of the Navy Regulations, and being obligated to use one's best exertions to preserve property and prevent waste thereof, as provided for by the release.

If the contention of Plaintiff-in-Error is sustained, a marked injustice will result in that the commanding officer will be deprived of the benefit provided by Article 1510 of the Navy Regulation after having been compelled to assume its obligations.

Not only did the commanding officer, in this case, assume a very substantial and grave responsibility in regard to this gold, but the mere fact of its being aboard the vessel under his command increased the hazards of the voyage and the customary duties and obligations of a naval officer. Nevertheless, Plaintiff-in-Error has the effrontery to state in its brief (p. 18) that, "All the plaintiff (Defendant-in-Error) had to do with the transaction was to command the vessel on her voyage over."

VI

Neither the conditions imposed by the order of the Secretary of the Navy, nor the rights provided by Section 1624, Revised Statutes, and Article 1510 of the Navy Regulations, were waived by the commanding officer.

In the opinion of Judge Hand (Rec., p. 16, Op. D. J.), it is said, that the form of execution of the release, and its failure to release the commanding officer and the United States from all responsibility, were waived by the commanding officer.

Had it been his intention to do so, it is extremely doubtful that the commanding officer could have waived rights invested in others than himself. Both the commander-in-chief and the Navy Pension Fund had vested interests in the compensation provided to be paid by the shipper of gold (Article 1510, Navy Regulations, Rec., p. 4); and it nowhere appears that the commanding officer was at liberty to deprive either, or both, of such lawful rights, by the simple process of waiver, or in any other manner.

The commander-in-chief's portion of the amount paid by the shipper depends upon his uniting with the commanding officer in the responsibility for the care of the gold (Article 1510, Navy Regulations, Rec., p. 4). This is nothing more or less than compensation for services rendered. (Cartas *v.* United States, 250 U. S., 545.)

In the instant case, the commander-in-chief assumed the responsibility (Par. 3, "Movement Order No. 46," Rec., p. 39).

If the Secretary of the Navy has not authority to diminish an officer's compensation, as established by law (United States *v.* Symonds, 120 U. S., 46-49) it follows that a commanding officer may not do so.

Article 1510 of the Navy Regulations having the force and effect of law, because of Congressional recognition (Smith *v.* Whitney, 116 U. S., 181; Glavey *v.* U. S., 182 U. S., 606, and *In re* Kollock, 165 U. S., 526-536), provides that part of the compensation, provided to be paid by a shipper of gold, is the property of the Navy Pension Fund. The commanding officer may waive said provision only in the event that Congress has authorized him to do so; and Congress has done no such thing.

The evidence, in the instant case, proves beyond a doubt that the commanding officer, rather than having waived rights, did everything within his power to preserve them.

Plaintiff-in-Error placed its own gold aboard the *Laub* for shipment to New York. The commanding officer signed bills of lading for the amount. These facts are admitted (Pars. X and XI, Complaint; Rec., p. 5; admitted by Answer, Rec., p. 6).

It is conceded that the commanding officer knew of the substance of the Secretary's order prior to taking the gold aboard his vessel. But that order referred to gold, the property of the *Relief Administration,* and not the *United States Grain Corporation's gold* ("Exhibit B of C," Rec., p. 38). There is not so much as a suggestion in the evidence that the Secretary's order referred to the gold taken on board the United States Ship *Laub;* or that the commanding officer had the slightest reason to believe that the said order had any reference to the United States Grain Corporation. By what process of reasoning, then, can it be said that the commanding officer should have attached any significance to the Secretary's order as relating to the gold which was placed aboard his vessel?

After having received the gold on board, Major Galbraith proffered to the commanding officer the so-called release. (Par. 4, "Defendant's Exhibit C," Rec., p. 37; "Exhibit A of C," Rec., p. 38.) Major Galbraith neither told the commanding officer that he purported to represent the United States Grain Corporation, or the Relief Administration; and there is not a particle of evidence showing that the commanding officer had the faintest idea who Major Galbraith was, or whom he represented.

The commanding officer read the document

handed him by Major Galbraith (Sec. 4, "Defendant's Exhibit C," Rec., p. 37), which, by form and substance, was a release of the United States Food Administration. What had such a release to do with the United States Grain Corporation's gold? Under a preceding point we have attempted to disclose reasons why the United States Food Administration did not, and could not, have had power to act for the United States Grain Corporation, in the premises. (Point V.)

Having read the document, the commanding officer prepared and gave to Major Galbraith, a paper, wherein it is stated, "I cannot accept your release," and, "I take full responsibility for the transportation of gold to the United States." (Par. 4, "Defendant's Exhibit C," Rec., p. 37, and "Exhibit C of C," Rec., p. 39.)

Thereafter, the commanding officer received from Rear-Admiral Bristol, Order No. 46, which *authorized* him to transport the gold pursuant to the provisions of Article 1510 of the Navy Regulations, and Section 1624, Revised Statutes. (Par. 4, "Defendant's Exhibit C," Rec., p. 37, and "Exhibit C of C," Res., p. 39).

Overwhelmed as it is by evidence to the contrary, the Plaintiff-in-Error has the temerity to contend that there may be no recovery, in this case, because the commanding officer knew that the United States Grain Corporation never intended to pay for the transportation of its gold.

When the United States Grain Corporation placed its gold on board the United States Ship *Laub*, as freight, and the commanding officer signed bills of lading for the amount, its responsibility to pay the "usual percentage" for freight was imposed upon it by the very provisions of law, by

virtue of which it was authorized to use a navy vessel for that purpose.

But assuming that the mere fact that the commanding officer knew that the United States Grain Corporation did not intend to pay for the affreightment of its gold annulled the provisions of Article 1510 of the Navy Regulations, the onus was upon Plaintiff-in-Error to prove the fact. And it failed to do so. Not the slightest intimation of any such intention can be gleaned from the evidence. An order of the Secretary of the Navy, purporting to suspend the provisions of Article 1510 of the Navy Regulations *for the benefit of the Relief Administration*, and a so-called release *by the United States Food Administration*, cannot be availed of to establish the fact that the *United States Grain Corporation* did not intend to pay for the transportation of *its* gold.

When the facts above stated are considered, it is beyond peradventure that the commanding officer did not waive the obligations imposed upon the Plaintiff-in-Error by law, or the conditions upon which the Secretary provided that the suspension of Article 1510 of the Navy Regulations depended.

To constitute a waiver, there must be an intention to relinquish the right, or there must be words or acts calculated to induce the other contracting party to believe and which deceived him into the belief that the holder of the right has abandoned it; and the party deceived must have acted on his belief so that an assertion of the right will inflict upon him a loss he would not have sustained if its holder had not appeared to relinquish it.

Rice v. *Fidelity and Deposit Co.*, 103 Fed., 427;

Equitable Society v. *McElroy*, 83 Fed., 631;
Insurance Co. v. *Thomas*, 82 Fed., 406.

In the case of *Rice* v. *Fidelity and Deposit Co.*, *supra*, the Court held:

> "There is nothing in the evidence received which tended to show that the defendant ever intended to relinquish its right. * * * No evidence was introduced to show that they were induced by that fact to believe, or that they did believe, that any such waiver had been made."

A waiver of an existing right to be effectual must be made intentionally, and where there is no express agreement to surrender a right, the mere action of a person, to have that effect, must be such as to evince clearly an intention in the mind of the actor to make the surrender.

Balfour v. *Parkinson*, 84 Fed., 855;
Bennecke v. *Ins. Co.*, 105 U. S., 353.

Plaintiff-in-Error has neither pleaded (Answer, Rec., p. 6), nor relied, in the action upon a waiver by the commanding officer as a defense.

VII.

The order of the Secretary of the Navy purporting to suspend the provisions of Article 1510 of the Navy Regulations, not having been approved by the President, was invalid.

It is not maintained by Plaintiff-in-Error that the Secretary's order had been, in fact, approved by the President; and there is nothing in the evidence indicating that the President had the slight-

est notion of the Secretary's intention of issuing such an order. However, it is asserted that the approval of the President is presumed.

Whatever may be the general law on the subject, it is certain, that, in the case of a change of a navy regulation, the original approval of the President is a condition precedent to its validity.

The authority of the Secretary to change or modify a navy regulation is provided for by law. Section 1547 of the United States Revised Statutes authorizes the Secretary of the Navy, *with the approval of the President*, to alter a navy regulation. Navy regulations having the force and effect of law (United States *v.* Symonds, 120 U. S., 46-49) it follows, that when Congress, by a delegation thereof, makes the power to alter such regulations depend upon the "approval of the President," an actual, as distinguished from an implied, approval is intended.

Any question that otherwise might arise, has to some extent been set at rest by the construction placed upon the meaning of Section 1547 of the Revised Statutes, by the Navy Department. This, pursuant to the well-established rule of law, that, "when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution" (United States *v.* Hermanos, 209 U. S., 337-339).

Article 901 of the Navy Regulations (Par. 2, A of Chap. 10) provides:

> "*Navy Regulations.*—These shall include all regulations requiring the *original approval* of the President of the United States, and consequently the same approval of any change."

Attention is again directed to the opinion of the

Judge Advocate General, cited with approval in Plaintiff-in-Error's brief (p. 71), holding that a suspension of a Navy Regulation may be had "*only by the personal action of the President.*"

VIII.

The genesis and status of the United States Grain Corporation.

To successfully dispel several specious but wholly untenable arguments advanced by Plaintiff-in-Error as reasons why it is not obliged to pay for the transportation of its gold, it is necessary to ascertain whether or not it was invested with any special rights, privileges or exemptions in addition to those granted to it by the laws of Delaware.

By an *Act of Congress, approved August 10, 1917* (hereinafter referred to as the "Food and Fuel Act") entitled:

> "An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel."

the President was invested with extraordinary powers relative to food products and fuel. This pronouncement was intended, and it is so stated in the Act, to be for the successful prosecution of the war; for the support and maintenance of the army; to insure an adequate supply and distribution of food stuffs; to facilitate the movements of food and fuel, and to prevent hoarding.

The United States Food Administration was created by the President, pursuant to an *Executive Order, dated August 10, 1917;* and Herbert Hoover

was appointed United States Food Administrator, with authority to "supervise, direct and carry into effect the provisions of said act, and the powers and authority therein given to the President, so far as the same apply to foods, feeds and their derivative products" (Exhibit "No. 1," Rec., p. 43).

It is further provided in said Executive Order, that:

> "All departments and established agencies of the Government are hereby directed to co-operate with the United States Food Administrator in the performance of his duties as hereinbefore set forth, and to give said Administrator such support and assistance as may be requisite or expedient to enable him to perform his said duties and avoid duplication of effort and expenditure of funds."

These provisions, directing the departments and agencies of the Government to co-operate with the United States Food Administrator, in the performance of *his* duties, are important because the Plaintiff-in-Error contends that in some manner, which it does not take the trouble to explain, it became possessed of the right to such co-operation. That this was not the fact will hereafter appear.

Referring again to the *Food and Fuel Act*, a provision is found apart from the main portion of the Act, providing as follows:

> "The President is authorized from time to time to purchase, to store * * * and to sell for cash at reasonable prices, wheat, flour, meal, beans and potatoes."

The President having been authorized to create and use any agency or agencies, in carrying out

the purposes of the Act, issued an *Executive Order, dated August 14, 1917* (Exhibit "No. 2," Rec., p. 44), providing, among other things, as follows:

> "And, whereas, in order to enable the United States Food Administration acting under the direction of the President, to efficiently exercise the authority granted by said Act, and to purchase, store, provide storage facilities for and to sell for cash at reasonable prices, the commodities above named, and to enable said United States Food Administration to purchase and sell said commodities in the manner and by the methods customarily followed in the trade, it is expedient and necessary that a Corporation should be organized," etc.
>
> "Now, therefore, under and by virtue of the power conferred upon me by the above entitled Act as hereinbefore set forth, it is hereby ordered that an agency, to wit, a corporation, under the laws of Delaware, be created, said corporation to be named Food Administration Grain Corporation," This name was subsequently changed to United States Grain Corporation. (Par. III of Complaint, Rec., p. 4; admitted by Answer, Rec., p. 6.)

Considered solely in the light of the provisions of this Executive Order, the purpose of the organization of the United States Grain Corporation was to enable the United States Food Administration to purchase and sell said commodities "*in the manner and by the methods customarily followed in the trade.*" In other words, in the purchase and sale of food commodities, the said corporation to be formed was to carry on its business precisely as that kind of business was carried on by other trading corporations.

Neither the "Food and Fuel Act," nor the Executive Order authorizing the formation of the

corporation, by word or inference, conferred upon the United States Grain Corporation any unusual or extraordinary powers or exemptions. It was to conduct its business as a trading corporation, having rights and assuming obligations like other trading corporations.

That there might be no doubt as to his intentions, the President further provided in said Executive Order of August 14, 1917 (Rec., p. 46):

> "The United States Food Administrator is hereby directed to cause said corporation to be formed, with the powers contained in the articles or certificate of incorporation * * * which have been approved by the President."

The *Certificates of Incorporation* of the Plaintiff-in-Error ("Plaintiff's Exhibit 1," Rec., p. 29), among other things, provides:

> "To do any and all the things herein set forth to the same extent as natural persons might or could do;
>
> "In general, to have and to exercise all the power conferred by the laws of Delaware upon corporations formed under the laws hereinafter referred to" (General Corporation Laws of Delaware).

The General Corporation Laws of Delaware are entitled, "An Act providing a General Corporation Law," approved March 10, 1899, and provide that corporations formed thereunder shall have power, "To sue and be sued; complain and defend in any court of law or equity," and "to conduct business in this state, other states * * * and in foreign countries."

Had he the power to do so, and he obviously had not, the fact is that, aside from the right to purchase, store and sell food products, the Presi-

dent did not delegate to the United States Grain Corporation any of the rights or powers invested in him by the "Food and Fuel Act." Nor did the President authorize the United States Food Administration to confer upon said corporation, any of the rights or powers which, by the President, were delegated to that organization.

The United States Grain Corporation was organized to enable the United States Food Administration to trade in food products, "in the manner and by the methods customarily followed in the trade"; and was authorized to carry on its business "as natural persons might or could do," and, in general, to have and to exercise all the powers conferred by the laws of Delaware."

All the evidence, in this case, clearly indicates that the United States Grain Corporation was intended and authorized to be, simply, a food products trading corporation, and to act as the agent of the United States Food Administration for the purpose of facilitating it in the purchase, storage and sale of said products.

Its business was conducted, its contracts entered into, its obligations assumed and its funds deposited *in its own name*, and its corporate affairs, considered as a whole, resulted in a profit (Par. 7, "Defendant's Exhibit D," Rec., p. 41).

The provisions in the "Food and Fuel Act," authorizing the President, in carrying out the purposes of the Act,

> "to utilize any department or agency of the Government and to co-ordinate their activities so as to avoid preventable loss or duplication of efforts or funds,"

cannot be fairly interpreted to mean that the President might use such departments or agencies and

suspend the compensation provided by law to be paid to the officers, and Navy Pension Fund, of the United States Navy. There is no good reason why the provisions of Article 1510 of the Navy Regulations continuing effective would be inconsistent with the purpose of the said provision, to wit, "to avoid preventable loss or duplication of efforts or funds."

The payment of the compensation provided for the transportation of gold is not within the meaning of "preventable loss" or "duplication of funds," as intended by Congress.

Whatever Congress may have intended, in the premises, there are two very substantial reasons why the United States Grain Corporation could not have availed itself of this authority invested in the President:

First.—There is nothing in the "Food and Fuel Act" authorizing the President to delegate to a corporation organized under the Laws of Delaware to purchase and sell food products, the right to utilize the various departments and agencies of the Government.

Second.—There is not a scintilla of evidence in this case that the President so much as intended to do so.

IX.

The transaction between the United States Grain Corporation and the Government of Bulgaria was private, not governmental.

The nature of the transaction, by virtue of which the United States Grain Corporation obtained the gold transported upon the United States Ship *Laub*,

is evidenced by a written contract, dated March 28, 1919 ("Plaintiff's Exhibit 2," Rec., p. 32).

It appears upon the face of this contract that it is, and is intended to be, nothing more than an ordinary commercial transaction between the parties.

Plaintiff-in-Error contends, that in respect to this contract with the Bulgarian Government, and the transportation of the gold obtained pursuant to its provisions, it was an instrumentality or agency of the Government of the United States, and entitled to receive aid and assistance from all departments and agencies of the Government in the performance of its duties as such.

It may be, as was held in the case of *Panama R'y. Co.* v. *Curran*, 256 Fed., 768, that when the Government itself creates its own agent, and owns part or all of the stock of the agent thus created, the test of corporate responsibility or whether the transaction is private or governmental is the nature of the business done. It was further held in that case, however, *that when a soverign uses an agency created not by itself but under a State statute, he takes his agent as he finds it.*

In the instant case, the corporation was not created by the sovereign, but under the laws of the State of Delaware; but assuming that it was created by the Government itself, the transaction with Bulgaria was of a private, not governmental, nature.

If there is any merit in Plaintiff-in-Error's contention, it follows that in March, 1919, it was authorized to sell wheat flour to the Government of Bulgaria as the agent of the United States Government.

A consideration of the Acts of Congress, and

Executive Orders, which can by any possible argument be made to apply to the United States Grain Corporation, conclusively establishes the fact that it was not, and could not have been, an agent of the United States in the transaction under consideration.

The "*Food and Fuel Act*" was a measure designed to provide for the national security and defense, and by its very nature had no application to the sale of food stuffs to Bulgaria. Neither the *Executive Order of August 10, 1917*, providing for the organization of the United States Food Administration (Exhibit "No. 1," Rec., p. 43) nor the *Executive Order of August 14, 1917*, authorizing the incorporation of the United States Grain Corporation (Exhibit "No. 2," Rec., p. 44), both of which were predicated upon the "Food and Fuel Act," appoints the United States Grain Corporation as the agent of the United States or authorizes it to act in a governmental capacity.

The *Proclamation of June 21, 1918* (Exhibit "No. 3," Rec., p. 46) provides that the United States Grain Corporation shall act as the agency of the United States to carry out and make effective that part of the provisions of the "Food and Fuel Act" relating to guaranteed prices to be paid for wheat, for the purpose of stimulating the production thereof.

Prior to the issuance of this proclamation, the United States Grain Corporation had not been designated as the agent of the United States for *any* purpose; but the fact that it had been designated therein for the purpose specified has no bearing upon the instant case for the reason that the Act upon which the proclamation is based does not authorize the sale of food products to Bulgaria.

It is provided in the "Food and Fuel Act" (Rec., p. 47, at top), that:

> "the president may, in his discretion, purchase any wheat for which a guaranteed price shall be fixed under this section, and may hold, transport or store it, or sell, dispose of and deliver the same to any citizen of the United States or to any Government engaged in war with any country with which the Government of the United States is or may be at war or to use the same as supplies for any department or agency of the Government of the United States."

The Government of Bulgaria was not "any Government engaged in war with any country with which the Government of the United States is or may be at war," and for that reason the President, by virtue of the "Food and Fuel Act" was not authorized to sell and deliver wheat to Bulgaria. The President, of course, could not have invested the United States Grain Corporation with any power he did not himself possess.

The so-called "Foreign Relief Act," approved by Congress, February 25, 1919, specifically omitted Bulgaria from its purview. This appears in the very title of the Act, which reads:

> "An Act for the relief of such populations in Europe, and countries contiguous thereto, outside of Germany, German-Austria, Hungary, *Bulgaria*, and Turkey, as may be determined upon by the President as necessary."

Exercising the powers invested in him by said Act, the President issued the *Executive Order of March 1, 1919*, (Exhibit "No. 4," Rec., p. 51) authorizing the organization of the American Relief Administration, "for the purpose of carrying out

the provisions of said Act," and empowering the "Director General" thereof to employ the Food Administration Grain Corporation (United States Grain Corporation) "as an agency for the purpose of transportation and distribution of foodstuffs and supplies to the populations requiring relief."

It is obvious that the Director General was not authorized to appoint the United States Grain Corporation as the agent of the United States, or to permit it to *sell* foodstuffs to foreign Governments. He was, by said Executive Order, authorized to employ the United States Grain Corporation as the agent of the American Relief Administration for the specific purpose of "transportation and distribution of foodstuffs."

In any event, *the said "Foreign Relief Act" authorized no one to sell, transport or deliver foodstuffs to Bulgaria.* It was not until March 30, 1920, long subsequent to the transactions which are the subject of the instant action, that Congress authorized the United States to provide foodstuffs to Bulgaria. This it did by an Act, approved on that date, entitled, "An Act Providing for the Relief of Populations in Europe and in countries contiguous thereto, suffering for the want of food."

There is but one other Executive Order referred to by Plaintiff-in-Error, and that is the *Executive Order of May 14, 1919.* (Exhibit "No. 5," Rec., p. 52.)

The contract by which the United States Grain Corporation agreed to sell and the Government of Bulgaria agreed to purchase wheat flour, was entered into between the parties on *March 28, 1919.* What an Executive Order issued almost two months later could have to do with that transaction is not apparent; and heretofore Plaintiff-in-

Error has not referred to it, either by its Answer (Rec., p. 6) or otherwise than by making it part of the record along with several other Executive Orders. In any event, it does not concern a sale of foodstuff to Bulgaria because the Acts of Congress upon which it is predicated (First paragraph, Rec., p. 52) do not authorize such a transaction, and the Executive Order itself refers only to wheat purchased subsequent to May 14, 1919. (First paragraph, Rec., p. 53.)

It appears, then, to be beyond dispute that the transaction under consideration was not a transaction between the Governments of the United States and Bulgaria. International transactions are entered into pursuant to treaty powers or statutes, and in no other way.

Federal Sugar Refin. Co. v. *United States S. E. Board,* 268 Fed., 575-583.

Whatever may have been the status of the United States Grain Corporation as to other transactions, it dealt with Bulgaria solely by virtue of the powers derived from the General Corporation Law of Delaware, and Plaintiff-in-Error admits in its brief (p. 62) that, in engaging in commercial contracts it is, and was, a business corporation.

Congress did not enact any statute incorporating the United States Grain Corporation or specifically providing for its incorporation. The President could have used any agency he saw fit in the purchase, storage and sale of foodstuffs. He determined upon a Delaware corporation, but he did not purport to change the rights, duties, obligations and liabilities of such a corporation. He could not have done so, for the reason that no such power was invested in him by Congress.

The fact that the President directed the incorporation is of no moment. That means nothing more than that the President directed that the necessary number of persons required under the Delaware statute should take the steps necessary to incorporate subject to the liabilities of that statute.

Because the gold transported aboard the United States Ship *Laub* was owned by the United States Grain Corporation as part of its assets, and all the stock of the United States Grain Corporation was owned by the United States, does not affect its status or limit its liability. It is in precisely the same position as if all its stock was owned by private individuals.

> *United States* v. *Strang*, 254 U. S., 491-493;
> *Federal Sugar Refin. Co.* v. *United States S. E. Board*, 286 Fed., 575-585.

In the United States *v.* Strang case, it is held that, "notwithstanding all its stock was owned by the United States it must be regarded as a separate entity"; and in the case of the *Sloan Shipyards Corporation et al.* v. *United States Shipping Board Emergency Fleet Corporation* (Nos. 308, 376 and 526—October Term, 1921, Supreme Court of the United States), it is held, "The United States took all the stock but that did not affect the legal position of the company."

In the case of the *Sugar Refining Co.* v. *United States S. E. Board*, 268 Fed., 575-586, the proposition is stated as follows:

> "No case has been or can be cited which authorizes the President of the United States to change a State statute or the powers conferred thereby or the liabilities necessarily

> flowing therefrom. The property of the corporation cannot become the property of the stockholders until all provable claims are liquidated, no matter what the purpose of the stockholder may be and the Government's position as a stockholder is no different from that of a sovereign State which is a stockholder. * * * The United States is not an incorporator but a stockholder in a corporation."

In enacting statutes designed to encourage the production, conserve the supply and control the distribution of food products, it is necessary that Congress confer large and almost unlimited powers to select agencies to that end, and it is fair to assume that in carrying out the provisions of such statutes, Congress realized that it would be necessary to engage in commercial transactions.

The fact that the United States Grain Corporation was incorporated under the laws of Delaware demonstrates that the ordinary methods of transacting business by executive departments was inadequate, and that a trading corporation would permit the purchase and sale of foodstuffs to be carried on in the usual manner and by methods similar to those employed by private individuals or business corporations.

The purchase and sale of food commodities is commercial by nature, and the President clearly indicated that he intended that the United States Grain Corporation conduct its business like ordinary commercial organizations by providing that the purchase and sale of such commodities should be undertaken "in the manner and by methods customarily followed in the trade" (Exhibit "No. 2," Rec., p. 44, on p. 45).

The Shipping Board Act authorized the Shipping Board to form one or more corporations under

the laws of the District of Columbia (The Lake Monroe, 250 U. S., 246-251) but the "Food and Fuel Act" merely provided, that, in carrying out the purposes of the act, "the President is authorized * * * to create and use any agency or agencies" (Exhibit "No. 2," Rec., p. 44, at top of p. 45). And in directing the incorporation of the United States Grain Corporation, for the purpose of enabling the "United States Food Administration to purchase and sell said commodities (foodstuffs) in the manner and by the methods customarily followed in the trade" (Exhibit "No. 2," Rec., p. 44), the President intended the corporation to engage in a commercial business. (Federal Sugar Refining Company *v.* United States Equalization B'd., Inc., 268 Fed., 575-587.)

The whole tendency is against the extension of the immunity and prerogatives of the sovereign, and the instant case does not invite a step in the opposite direction (The Lake Monroe, 250 U. S., 246, and Gould Coupler Co. v. U. S. Shipping B'd Emergency Fleet Corp., 261 Fed., 716).

That the United States Grain Corporation was not an agency of the United States or an instrumentality of Government, in respect to the Bulgarian transaction and the transportation of gold obtained therefrom, is a fact we feel confident of having clearly and conclusively established. But whether or not it acted as a Governmental agency is not, in and of itself, determinative of the question of its rights and liabilities. No matter what the purpose of doing so may have been, the activities of this corporation, by their very nature and its very existence, were commercial business.

There is not the slightest indication in any of the Acts or Orders, which directly or indirectly

applies to the United States Grain Corporation, that either Congress or the President intended the corporation to have special privileges or exemptions.

> "It is generally highly desirable that in entering upon industrial and commercial ventures the Government agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed."
>
> *Gould Coupler Co.* v. *U. S. Shipping Board Emergency Fleet Corp.*, 261 Fed., 716-718.

> "When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. Although it absolutely owns the Panama Railroad, and is the only person profiting or losing by its activities, still the Railroad Co. sues and is sued just like any other corporation in its own name."
>
> *Salus* v. *United States*, 234 Fed., 842-844.

It is respectfully submitted that the United States Grain Corporation was engaged in a strictly commercial business, and, at least as far as concerns its transaction with Bulgaria, it was neither an instrumentality nor agency of the Government.

Plaintiff-in-Error has wholly failed to show, in the transaction under consideration, that it stood in any other position than that of other corporations organized under the laws of Delaware.

On page 69 of Plaintiff-in-Error's Brief, it is stated:

> "Any contention that the defendant had no

> authority to deal with Bulgaria comes too late."

We have not heretofore, and do not now, make any such absurd contention. "Defendant" did have such authority; but such authority as it did have to deal with Bulgaria *was derived solely through the laws of the State of Delaware.* It had no such authority by virtue of Statute or Executive Order, and *that* is our contention.

Continuing on the same page of its Brief, Plaintiff-in-Error asserts:

> "Assuming that the Relief Administration had no statutory or executory authority to supply Bulgaria or use the defendant in the matter, the fact remains that all hands understood differently at the time."

This Court is not referred to any part of the record of this case as authority for this statement, for the reason that there is nothing in the evidence justifying it. The statement is made without a single fact or circumstance to support it. The proof is that the United States Grain Corporation entered into the contract for its own and exclusive account ("Plaintiff's Exhibit 2," Rec., p. 32; Par. VIII of Complaint, admitted by the Answer, Rec., p. 5, and Par. 12 of Answer, p. 9). And as far as the record goes, neither the Relief Administration nor the Food Administration had anything to do with the transaction, directly or indirectly.

X.

The judgment of the United States Circuit Court of Appeals, reversing the judgment of the United States District Court and directing the entry of final judgment for the plaintiff (Defendant-in-Error), should be affirmed.

Dated January , 1923.

HAROLD N. WHITEHOUSE,
EDWARD S. HATCH,
MAURICE W. CLARKE,
Counsel for Defendant-in-Error,
522 Fifth Avenue,
New York, N. Y.

[8927]

Appeal Printing Co., 22 Thames St., N. Y. City

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1922.
No. 290.

UNITED STATES GRAIN CORPORATION,
Plaintiff-in-Error,

against

WALLACE B. PHILLIPS,
Defendant-in-Error.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for Plaintiff-in-Error,
42 Broadway,
New York, N. Y.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

IN THE

Supreme Court of the United States of America.

UNITED STATES GRAIN CORPORATION, Plaintiff-in-Error, AGAINST WALLACE B. PHILLIPS, Defendant-in-Error.	October Term, 1922. No. 200.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

In so far as the various points of law advanced in his brief by the defendant-in-error (plaintiff below and hereinafter referred to as the plaintiff) are concerned, the plaintiff-in-error (defendant below and hereinafter referred to as the defendant) is content to rest upon its original brief. The plaintiff, however, has accused the defendant of making certain erroneous or unwarranted statements of fact in its main brief and his argument to a certain extent, at least, is based on the assumption that these statements are incorrect.

It is to these accusations that the defendant desires to reply. They are set forth on pages 4, 5 and 6 of the plaintiff's brief. We respectfully submit that the statements in our main brief characterized by the plaintiff as erroneous or unwarranted are all fully borne out by the record,

either by way of admission on the part of the plaintiff himself, uncontradicted testimony or fair implication from admission and testimony taken together.

Moreover, it is to be recalled that the judgment below, given after each side had moved for a directed verdict, was in the defendant's favor, and therefore every intendment must be taken in its favor in construing the facts and the inferences therefrom.

I.

The plaintiff claims that the statement contained in our main brief on page 5, to the effect that the agreement between the defendant and the Bulgarian Government made in March, 1919, was made pursuant to the Act of Congress of February 24, 1919, and the Executive Order of the President of March 1, 1919, is unwarranted. This, we submit, is a mere quibbling over words. A reference to the statement on page 5 of our brief, shows that what we said was that the American Relief Administration was organized under authority of this Act of Congress and the Executive Order of the President, and that the defendant was designated as an agency to assist and simplify the work of this Relief Administration and that "pursuant thereto, the defendant entered into an agreement with the Government of Bulgaria". The plain and ordinary meaning of these words is, we submit, that pursuant to its designation as an agency to assist the Relief Administration, the defendant entered into the contract in question. The Executive Order of March 1, 1919, so designating the defendant as an agency to assist the Relief Administra-

tion, appears on page 51 of the record; and in the testimony of Mr. Flesh, Vice-President of the defendant, it was shown that Mr. Heinz was appointed to take charge of the Relief Administration's operations in Constantinople and that Mr. Heinz was given authority to "sign for the Grain Corporation as also for the American Relief Administration" (Rec. 21). The contract itself with Bulgaria was signed by Mr. Heinz as agent for the defendant (Rec. 33), and it does not seem to be any stretching of the facts for us to state, as we have done, that pursuant to its designation as an agency to work with the Relief Administration this contract with Bulgaria was made. Heinz was, in effect, the representative of both principal and agent. The plaintiff makes much of the point that transactions with Bulgaria were specifically excluded by the Act of February 25, 1919, but as we have pointed out in our main brief, this question does not affect that of the liability of the defendant to pay the plaintiff for the transportation of the gold from Constantinople to New York which is the point of this case. It is wholly immaterial so far as this case is concerned, as to whether or not the transaction with Bulgaria was authorized by the Act. In any event, it seems clear that whatever the defendant did in connection with the Bulgarian transaction was as an agency of the Relief Administration and was therefore "pursuant to its designation as such".

II.

The plaintiff further states that there is not a particle of evidence in the case that the gold in question was transported from Varna to Constantinople for the defendant on various war vessels stationed

in or about the latter port (Plaintiff's brief, p. 5). To refute this statement we have merely to point to paragraph 14 of the answer (Rec. 9) and Defendant's Exhibit "B", consisting of a stipulation between the attorneys for the parties, whereby the allegations of said paragraph 14 of the answer were admitted (Rec. 36).

III.

The plaintiff then states that there is no evidence that the defendant applied to the Navy Department for permission to ship the gold from Constantinople to the United States on board a war vessel and requested the Navy Department to suspend Section 1547 of the Navy Regulations.

As pointed out above, the evidence is clear and shows conclusively that the defendant was the agent of the American Relief Administration in the Near East, and that the transaction with Bulgaria whereby the defendant came into possession of this large quantity of gold was entered into by it as such agent. As we have pointed out in our main brief, all the parties involved at Constantinople in connection with the shipment of gold clearly showed by their actions and their statements that they considered this gold to be that covered by Admiral Knapp's cablegram to the Secretary of the Navy (Rec. 38).

This cablegram, as the plaintiff properly states, refers to the *Relief Administration's* desire to ship five millions gold on board a destroyer, but it is perfectly clear, from all the evidence in the case, that the Relief Administration and the defendant were interchangeably regarded as one and the same thing, and that although technically the application

may have been made by the Relief Administration, it was in effect the same as though it had been made by the defendant itself. The very face of the record leads inevitably to this conclusion. But apart from the face of the record, the conduct of the parties, and in particular of the plaintiff himself, and of Admiral Bristol, his superior, gives the same implication. As we have pointed out in our main brief, it seems very clear that if either Bristol or the plaintiff had for a moment believed that the gold about to be shipped by the defendant was not that referred to in Admiral Knapp's cablegram and in the Secretary's reply thereto, they would have done nothing whatsoever about its transportation, or at most would have treated the shipment by the Grain Corporation as an independent and entirely new proposition. They would not have referred to the above cablegrams or annexed copies of them to the various orders and other documents when the defendant's gold was taken on board the *Laub*, for they would have believed that these cablegrams had no reference whatsoever to the defendant's gold.

IV.

The fourth statement in our main brief which the plaintiff points to as erroneous, is another case of quibbling about words. The plaintiff claims that our brief erroneously states, at page 7, that the defendant's representative and agent "in this transaction" was Major Galbraith, whereas the evidence shows that the contract with Bulgaria was made by Mr. Heinz as agent for the defendant (Plaintiff's brief, p. 6). Turning to our brief at the point where this statement appears (p. 7), it is sufficient to point out that "this transaction" was the placing of

the gold on board the *Laub* and the interchange of the various documents which was made at that time, not the making of the Bulgarian contract. The context here is perfectly clear, and it is a wide distortion of language for the plaintiff to claim that we have erroneously stated that the defendant's representative in the Bulgarian contract was Galbraith. Our brief makes no such statement, nor can it in any way be construed as implying any such thing. It simply states that Galbraith was our agent in connection with the shipment of the gold. That Galbraith was the defendant's representative in this connection is undisputed throughout the entire record; in fact, he was recognized and treated as such by the plaintiff (Rec. 20, 34, 37, 38, 39, 40, 41, 42).

We have taken the liberty of calling the Court's attention to the above points in the plaintiff's brief, not for the purpose of quibbling about immaterial and unimportant details, but in order that the record may be perfectly clear and that the court may have a proper understanding of it.

Dated January 16, 1923.

Respectfully submitted,

GARRARD GLENN,
WILLIAM B. WALSH,
DEWITT C. JONES, JR.,
Counsel for plaintiff-in-error,
42 Broadway, New York, N. Y.

M7743